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No. _____

In the

Supreme Court of the United States

October Term, 1999

STANLEY and JUDY STEARNS, husband and wife, and GIG HARBOR MARINA, INC., a Texas Corporation, d/b/a ARABELLA'S LANDING MARINA,

Petitioners,

v.

CITY OF GIG HARBOR, a municipal corporation of the State of Washington,

Respondent.

GIG HARBOR MARINA, INC., a Texas Corporation, d/b/a ARABELLA'S LANDING MARINA, and STANLEY STEARNS and JUDY STEARNS, husband and wife

Petitioners,

v.

THE CITY OF GIG HARBOR, a municipal corporation,

Respondent.

Petition for Writ of Certiorari to the Washington Supreme Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a state statute which penalizes private parties who appeal government regulatory decisions by requiring them to pay the government's attorneys' fees on appeal interferes with First Amendment rights to petition government for redress of grievances and free speech and Fourteenth Amendment rights to due process and equal protection?

2. Whether a state statute which imposes attorneys' fees against a private party who files a nonfrivolous appeal in judicial review of local government regulatory decisions conflicts with 42 U.S.C. §§ 1983 and 1988?

3. Whether a government entity's threat to seek attorneys' fees against private parties which chills the exercise of their statutory right of appeal violates the private parties' constitutional rights, and thus, entitles them to declaratory relief under 42 U.S.C. § 1983?

PARTIES TO THE PROCEEDING

The plaintiffs are Gig Harbor Marina, Inc, Stanley Stearns and Judy Stearns. There are no parent companies or wholly owned subsidiaries.

The defendant is the City of Gig Harbor, a municipality of the State of Washington.

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

OPINION BELOW 2

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE WRIT 10

I. REVIEW SHOULD BE GRANTED TO RESOLVE A SIGNIFICANT CONFLICT BETWEEN STATE COURTS AND FEDERAL CIRCUIT COURTS ON FUNDAMENTAL CONSTITUTIONAL RIGHTS 10

A. The Washington Courts' Decisions Contradict Due Process Jurisprudence 14

B. The Washington Court's Decisions Conflict With First Amendment Rights Including The Right To Petition Government For Redress Of Grievances 19

C. Wash. Rev. Code § 4.84.370, and the City's Application of it, Violates Equal Protection 23

II. THE WASHINGTON COURT'S DECISION ON THE RELATIONSHIP BETWEEN WASH. REV.CODE § 4.84.370 AND 42 U.S.C. § 1983 AND 1988 CONFLICTS WITH SUPREME COURT PRECEDENT . 26

CONCLUSION 28

TABLE OF AUTHORITIES

CASES

Bill Johnson's Restaurants, Inc. v. National Labor Relations Board,
461 U.S. 731 (1983) 12

Boddie v. Connecticut,
401 U.S. 371 (1971) 15, 23, 24

Bogni v. Perotti,
224 Mass. 152, 112 N.E.2d 853 (1916) 26

Bounds v. Smith,
430 U.S. 917 (1977) 20, 22

California Motor Transp. Co. v. Trucking Unlimited,
404 U.S. 508 (1972) 13, 19

Chambers v. Baltimore & Ohio Railroad,
207 U.S. 142 (1907) 11, 13

Christiansburg Garment Co. v. E.E.O.C.,
434 U.S. 412 (1978) 11, 26

Craft v. Wipf,
836 F.2d 412 (8th Cir. 1987) 20

Dolan v. City of Tigard,
512 U.S. 374 (1994) 12

Douglas v. California,
372 U.S. 353 (1963) 13, 23

Ex Parte Young,
209 U.S. 123 (1908) 14

Felder v. Casey,
487 U.S. 136 (1988) 27

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,
482 U.S. 304 (1987) 12

Ford Motor Co. v. Barrett, 115 Wash. 2d 556,
569, 800 P.2d 367 (1990) 16

Forsyth County v. Nationalist Movement,
505 U.S. 123 (1992) 20

Franco v. Kelly,
854 F.2d 584 (2d Cir. 1988) 22

Gibson v. Berryhill,
411 U.S. 564 (1973) 9

Gig Harbor Marina, Inc. v. City of Gig Harbor,
94 Wash. App. 789, 973 P.2d 1081 (1999) 2, 3

Graham v. National Collegiate Athletic Association,
804 F.2d 953 (6th Cir. 1986). 13

Greenwich Citizens Committee, Inc. v. Counties of Warren and Washington Industrial Development Agency,
77 F.3d 26 (2nd Cir. 1996) 22

Griffin v. Illinois,
351 U.S. 12 (1956) 23, 24

Gulf, Colorado, & Santa Fe Railway Co. v. Ellis,
165 U.S. 150 (1897) 24, 25

Harper v. Virginia State Board of Elections,
383 U.S. 663 (1966) 17

Harrison v. Springdale Water & Sewer Commission,
780 F.2d 1422 (8th Cir. 1986) 21

Hayes v. Seattle,
131 Wash.2d 706, 934 P.2d 1179 (1997) 26

Hoeber v. Local 30, United Slate, Tile & Composition Roofers, Damp and Waterproof Workers Association,
939 F.2d 118 (3rd Cir. 1991) 19

Hughes v. Rowe,
449 U.S. (1980) 11, 26

In re Halkin,
598 F.2d 176 (D.C. Cir. 1979) 19

In re Primus,
436 U.S. 412 (1978) 19

In re Workers' Compensation Refund,
46 F.3d 813 (8th Cir. 1995) 21

Lindsey v. Normet,
405 U.S. 56 (1972) 15, 18, 23

Logan v. Zimmerman Brush Co.,
455 U.S. 422 (1971) 15

Lutheran Day Care v. Snohomish County,
119 Wash.2d 91, 829 P.2d 746 (1992) 26

Marbury v. Madison,
5 U.S. 137 (1803) 10

Meyer v. Grant,
486 U.S. 414 (1988) 19

Missouri Pacific Railway Co. v. Tucker,
230 U.S. 340 (1913) 14

More v. Johnson,
193 Colo. 489, 568 P.2d 437 (Colo. 1977) 25

Murphy v. Commissioner of the Department of Industrial Accidents,
415 Mass 218, 612 N.E.2d 1149 (1993) 18

N.A.A.C.P. v. Button,
371 U.S. 415 (1963) 19, 20

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 20

North & South Ala. R. Co. v. Morris, 65 Ala. 193 (1880) ... 25

Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.,
508 U.S. 49 (1993) 11

Romer v. Evans,
517 U.S. 620 (1996) 23

Rosenblatt v. Baer,
383 U.S. 75 (1966) 20

Ryland v. Shapiro,
708 F.2d 967 (5th Cir. 1983) 13, 22

Silver v. Cormier,
529 F.2d 161 (10th Cir. 1976) 15, 21

Sintra, Inc. v. Seattle,
119 Wash.2d 1, 829 P.2d 765 (1992) 26

Sorrano's Gasco, Inc. v. Morgan,
874 F.2d 1310 (9th Cir. 1989) 22

Suitum v. Tahoe Regional Planning Agency,
520 U.S. 725 (1997) 12

United Mine Workers v. Illinois State Bar Ass'n,
389 U.S. 217 (1967) 20

Valot v. Southeast Local School District Board of Education,
107 F.3d 1220 (6th Cir. 1997) 22

Wagner Electric Corp. v. Thomas,
612 F. Supp. 736 (D. Kansas 1985) 14

Wolff v. McDonnell,
418 U.S. 539 (1974) 12

Zorzi v. County of Putnam,
30 F.3d 885 (7th Cir. 1994) 21

FEDERAL STATUTES

28 U.S.C. § 1254 2
28 U.S.C. § 2403 2
42 U.S.C. § 1983 26
42 U.S.C. § 1988 26

STATE STATUTES

WASH. REV. CODE § 4.84.370 ..... passim
WASH. REV. CODE § 36.70C.030 3

CONSTITUTIONAL PROVISIONS

U.S. Const. Amendment XIV, §1 2
U.S. Const. Amendment I 2

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OPINION BELOW

The decision of the Washington Supreme Court in *Gig Harbor Marina, Inc. v. City of Gig Harbor,* denying the petitioners' petition for review is reproduced at Appendix (App.) A. The opinion of the Washington Court of Appeals was issued on April 21, 1997, and is reported at *Gig Harbor Marina, Inc. v. City of Gig Harbor,* 94 Wash. App. 789, 973 P.2d 1081 (1999). App. B.

The decision of the Washington Supreme Court in *Stearns v. City of Gig Harbor,* denying the petitioners' petition for review is reproduced at Appendix C. The opinion of the Washington Court of Appeals was also issued on April 21, 1997, and is unpublished, but appended hereto as App. D.

JURISDICTION

The decisions of the Washington Supreme Court were entered on August 31, 1997. App. A & C. This case draws into question the validity of a state statute, WASH. REV. CODE § 4.84.370 (appended as App. E) on the ground of it being repugnant to the Constitution and laws of the United States. Therefore, this Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1257.

Because the constitutionality of a Washington State statute is drawn into question, 28 U.S.C.§ 2403(b) may apply and the Attorney General of the State of Washington has been notified of this proceeding.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

This case involves the First Amendment to the United States Constitution, appended hereto as App. F; Section 1 of the Fourteenth Amendment to the United States Constitution, appended as App. G; and Section 1983 of Title 42 of the United States Code, appended as App. H.

STATEMENT OF THE CASE

Factual Background of Gig Harbor Marina, Inc. v. City of Gig Harbor

In 1994, the petitioners (the Stearns) filed an application for site plan approval and a conditional use permit to construct a building for office, marine-related retail uses, and space for a yacht club with the City of Gig Harbor (the City). These multiple uses were allowed under the applicable Gig Harbor zoning designations.

During the review of the Stearns' applications, the City changed its interpretation of the zoning code's parking requirements for the Stearns' proposal. In the end, the City denied the Stearns' application based on lack of parking for the yacht club portion of their application.

Believing the City had incorrectly changed the interpretation of its ordinances applicable to the Stearns' proposal, the Stearns filed the underlying action pursuant to Washington's Land Use Petition Act, WASH. REV. CODE § 36.70C.030, appended hereto as App. J. After argument and briefing, the Pierce County Superior Court Judge rejected the Stearns' land use claims that the proposed parking for the yacht club was sufficient.

Before the Stearns' 30-day deadline to file an appeal had passed, the City immediately filed a motion to have the trial court determine the City's entitlement to recover attorneys' fees from the Stearns if the Stearns did file an appeal and happened to lose. This motion sought a determination that the City would be entitled to over $11,000, if the Stearns dared to appeal, but did not prevail. App. B, at 3.

Believing this tactic was designed to chill the Stearns from filing an appeal, the Stearns moved to supplement their complaint to seek declaratory relief that WASH. REV. CODE § 4.84.370 is

unconstitutional. The statute penalizes those who challenge government land use decisions by imposing the requirement that a challenger pay the governments' attorneys' fees. Yet, it does not operate equally because a successful challenger of government decision-making is not entitled to a fee award. The Superior Court reviewed the Stearns' claims by a summary judgment motion. The Stearns submitted the Declaration of Stanley Stearns (App. K) and the Declaration of Richard Lindberg (App. L). The City submitted no evidence.

Mr. Stearns declared:

> 5. ... I believe the purpose of the statute is to discourage individuals from seeking review in the Court of Appeals when local governments regulate private property and the regulation has been upheld by the Superior Court. That purpose is being fulfilled in the present case. Since I did not prevail before the Superior Court in the underlying land use claims, this statute discourages me from filing an appeal in this case if I would be forced to pay for the City's attorneys if I do not prevail.
>
> 6. My potential exposure under this statute for paying the City's attorneys' fees imposes a threat on me which would never apply to a party who agreed with the local government's decision in a land use matter. Consequently, I am far less likely to decide to appeal the Superior Court's denial of my claims because I cannot tell the future and know whether I will prevail on appeal. This is especially true because this statute will not entitle me to recover my attorneys' fees if I prevail in the Court of Appeals. The deck is stacked against me.
>
> 7. Even though I am convinced that I should prevail on appeal, the chance that I may not prevail and would be forced to pay at a minimum $11,712.15 has a chilling effect on my exercise of my rights to file an appeal. The prospect of having

> to pay for the City's attorneys at an undetermined amount causes me great consternation in deciding whether to appeal to enforce my rights.

App. K, at 2.

Similarly, Mr. Lindberg, who has no association with the Stearns' cases, described how the threat of fee exposure under WASH. REV. CODE § 4.84.370 chilled the exercise of an environmental organization's right to appeal. The organization did not file an appeal of a local government's permit decision because it was faced with the prospect of paying the government's and the developer's attorneys' fees if the organization was unsuccessful on appeal. App. L.[1]

These two declarations were the only evidence before the trial court. Nevertheless, the Pierce County Superior Court rejected the Stearns' claims that WASH. REV. CODE § 4.84.370 was unconstitutional. The Stearns filed an appeal despite the heightened financial risks to a challenge of the Superior Court's land use decision.

Division II of the Washington Court of Appeals issued its decision. In short, it affirmed the Superior Court decision on all of the land use issues. The Court ruled that the statute was constitutional in all respects and imposed a fee award against the Stearns in favor of the City.[2]

Factual Background of Stearns v. City of Gig Harbor

The Stearns proceeded to design and file a new site plan application. This second application eliminated the proposed yacht club to ensure compliance with the City's parking requirements.

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[1] The declaration references Section 718 of chapter 347, Laws of 1995. Section 718 was codified as WASH. REV. CODE § 4.84.370.

[2] The Court determined that the statute assessed attorneys' fees only for the attorney time spent in the Court of Appeals. App. B, at 10 n.6.

The Stearns' proposal complied with all zoning requirements and development standards. However, while the Stearns' application was pending, the City amended the Gig Harbor zoning code so as to change the regulations applicable to the Stearns' proposal. The Stearns' second proposal was denied by the City and the Stearns sought judicial review in the local superior court.

Again, the Pierce County Superior Court ruled in the City's favor. Again, the Stearns filed an appeal which the Court of Appeals ultimately rejected on the merits. As required by WASH. RULES OF APP. PROC. 18.1(b), the City indicated in its brief that it intended to seek fees under WASH. REV. CODE § 4.84.370. In their reply brief, the Stearns argued that the statute was unconstitutional. The Court of Appeals rejected the Stearns' argument, relied upon its contemporaneous decision in *Gig Harbor Marina v. City of Gig Harbor*, and awarded the City attorneys' fees under WASH. REV. CODE § 4.84.370. App. D, at 12.

The Court of Appeals' decisions were decided on the same day and the Washington Supreme Court denied the Stearns' petition for review on the same day—August 31, 1999. App. A and C.

The Statute at Issue: WASH. REV. CODE § 4.84.370

The statute provides:

> (1) Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:

> (a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town, ...
>
> (b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all other prior judicial proceedings.
>
> (2) In addition to the prevailing party under subsection (1) of this section, the county, city, or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal.

WASH. REV. CODE § 4.84.370.

This statute requires an appellate court to award reasonable attorneys' fees and costs to the prevailing party if: (a) the prevailing party on appeal to the Court of Appeals or Supreme Court also prevailed before the local government; **and** (b) the prevailing party on appeal prevailed in the trial court.

Significantly, anyone who seeks judicial relief from a land use decision of local government will never be entitled to an award of fees under this statute. By filing suit against the local government to challenge its land use decision, that party would not be the prevailing party "before the county, city or town" and, therefore, is ineligible for a fee award. Only local government and those aligned with government in the local administrative process (who would not challenge the government's decision) are potentially entitled to an award of fees. This scheme also guarantees that local government will never be responsible for paying attorneys' fees because any party opposing the government does not qualify for a fee award. A governmental opponent in litigation would not have prevailed before the local government.

The Washington Court of Appeals stated that this statute does not *automatically* deny a government challenger a fee award from the government. To support this conclusion, the Court created a far-fetched hypothetical:

> Suppose a city hearings examiner approves a proposed development, attaching three or more conditions. The developer appeals to the city council, which strikes all but one of the conditions; unless the stricken conditions were minor, the developer would have substantially prevailed before the City. Then suppose the developer appeals the remaining condition to superior court, which strikes it; the developer would be the prevailing party in that judicial proceeding as well. Finally, suppose the City appeals the superior court's decision to the Court of Appeals which, affirms the trial court. The developer would be the substantially prevailing party or prevailing party before the appellate court, the trial court, and the City and thus, the developer, not the City would be entitled to attorney's fees and costs under the statute.

App. B, at 6.

The Court of Appeals' unlikely hypothetical does not eliminate the inherent discrimination between private plaintiffs seeking review of government action and governmental defendants or those on the same side as government. At most, the Court of Appeals showed that an opponent of government might possibly get attorneys' fees in some unique situation where a private party chose to litigate a decision it had won. The developer or environmental challenger will have to pay the government's attorneys' fees in the vast majority of cases. For example, a developer or environmental organization could prevail before the city council (win 99 out 100 challenged issues). Nevertheless, it would still have to pay the City's attorneys' fees for unsuccessfully challenging the one remaining issue in the trial court and on appeal.

The Court of Appeals expressly recognized this discriminatory treatment in the favor of supporters of government decisions and against challengers of government decisions.

> Under the hypothetical, a developer who improved his or her position from the hearing examiner to the city council, but then failed to improve through the superior court and appellate court could argue under subsection (1) that the City is not entitled to fees because the developer prevailed at the city level. *But subsection (2) makes clear that under these circumstances, the City is entitled to fees.*

App. B, at 6 (emphasis added).

Subsection 2 requires that government *always* be considered the prevailing in the first stage of the process. Of course, the converse is not true. Anyone challenging a government decision must prevail at *every* level to obtain a fee award. A government must only prevail in court, regardless of the outcome at the administrative level. The Court's attempt to ignore the inequality cannot be squared with the wording of the statute. The discriminatory treatment remains.

Furthermore, the Court of Appeals' attempt to rescue the statute with a highly unique hypothetical creates its own problems. The city now has conflicting interests. A private party's entitlement to receive fees against a local government depends upon being considered a "substantially prevailing party" in an administrative process where the potential fee payer, namely the city, is the decision-maker. To avoid potential fee liability, a city will be motivated to make sure that any party who is not going to prevail absolutely (and therefore might be an opposing party in litigation) cannot be considered "substantially prevailing" before the city. If the land use applicant or environmental challenger is going to lose at all, it is far better for government to make sure the challenger loses big.[3]

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[3]This creates serious due process implications. Settled Supreme Court precedent prohibits judicial or administrative decisions by persons or entities that have a financial stake in the outcome. *Ward v. Village of Monroeville*, 409 U.S. 57 (1972); *Gibson v. Berryhill*, 411 U.S. 564 (1973).

Regardless of the hypothetical chance that in some unique circumstances a court might conclude that a plaintiff against government was entitled to a fee award, the statute still treats those challenging government differently from those supporting government.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10 provides nonexclusive factors considered in evaluating a petition for writ of certiorari. Of most concern here is Rule 10(c) which provides:

> a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

Rule 10(b) also references conflicts with other state and federal courts in the resolution of important federal questions.

The Washington Court of Appeals has decided important federal questions involving the constitutional right to petition judicial branches of government for redress of grievances caused by other branches of government. These decisions, however, are contrary to precedents of other state and federal courts.

I

REVIEW SHOULD BE GRANTED TO RESOLVE A SIGNIFICANT CONFLICT BETWEEN STATE COURTS AND FEDERAL CIRCUIT COURTS ON FUNDAMENTAL CONSTITUTIONAL RIGHTS

Early in the development of American jurisprudence with the landmark decision of *Marbury v. Madison*, 5 U.S. 137 (1803), the primacy of judicial review of government action has been a fundamental feature of American justice. In *Chambers v. Baltimore*

& Ohio Railroad, 207 U.S. 142 (1907), this Court recognized the importance of fairness and equality in *state* judicial systems. It carried on the tradition when it held unconstitutional a state statute which discriminated against nonresidents in the use of the state court system.

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government.

Id. at 148. Despite this long history of fairness in judicial review, the Washington State Legislature, with approval from the Washington State Courts, has authorized a mandatory and discriminatory penalty on the use of the state court system when a private litigant dares to seek appellate judicial review of government regulatory decisions.

In the course of its departure from traditional protection of litigants, the Washington Court of Appeals has decided several important questions of federal constitutional law that have not been, but should be, settled by this Court. These important questions of federal constitutional law conflict with relevant decisions of this Court as well as numerous other state courts and federal courts of appeals.

At the heart of this case is a state statute which requires the imposition of an award of attorneys' fees against those who dare to seek appellate review of government regulatory decisions and do not prevail on appeal. In reviewing statutory authorizations of attorney fee awards, this Court has explicitly recognized the obvious—that the risk of having to pay the government's attorneys' fees has a chilling effect on potential plaintiffs. *See Hughes v. Rowe*, 449 U.S. 5, 14 (1980) and *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 421 (1978).[4]

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[4] This Court has been extremely protective of rights of people to pursue litigation without fear of reprisal through the operation of other federal statutes. *See Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 56-61 (1993) (antitrust liability for litigation extends only to litigation which is "objectively baseless in the sense that no reasonable litigant could realistically expect success"); *Bill Johnson's*

The Washington Courts, too, did not dispute the fact that the statute at issue had a chilling effect on exercising the right of appeal and the only evidence presented was that those with grievances against government action were chilled. *See* App. K and L. Nevertheless, the Washington Courts concluded that the attorney's fee penalty was mere regulation of economic interests. App. B, at 8.

Washington's statute, if adopted by other jurisdictions, would have prevented this Court from ruling on several significant cases. In all of the following cases, the petitioning party did not prevail against the government in any of the prior judicial proceedings: *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987). If WASH. REV. CODE § 4.84.370 were in effect, it would be highly unlikely that Bernadine Suitum or Florence Dolan would have risked paying the government's attorneys' fees on appeal and this Court would have never been presented with those cases.

WASH. REV. CODE § 4.84.370, raises significant issues relative to the First Amendment right of citizens to petition government (the state's appellate courts) for redress of grievances. Courts have recognized that hurdles and penalties imposed on some groups of litigants can unconstitutionally infringe on access to courts. However, courts are split as to the source of this constitutional protection, whether it be the First Amendment right to petition government for redress of grievances, the right to free speech, since litigation is speech, or due process or equal protection.

> [T]he right of access has been traced to various provisions of the constitution." *See, e.g., Wolff v. McDonnell*, 418 U.S. 539, 579, 94 S.Ct. 2963, 2986, 41 L.Ed.2d 935 (1974) (Due Process

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Restaurants, Inc. v. National Labor Relations Board, 461 U.S. 731, 743 (1983) (lawsuit cannot be enjoined as an unfair labor practice). Like Section 1983, these statutes too were interpreted so as to protect the constitutional right to pursue litigation.

> Clause); *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S.Ct. 609, 611-12, 30 L.Ed.2d 642 (1972) (Petition Clause); *Douglas v. California*, 372 U.S. 353, 355, 358, 83 S.Ct. 814, 815-16, 9 L.Ed.2d 811 (1963) (Equal Protection Clause); *Chambers v. Baltimore & Ohio R.R.*, 207 U.S. 142, 148, 28 S.Ct. 34, 35, 53 L.Ed.2d 143 (1907) (Privileges and Immunities Clause of Article IV).

Graham v. National Collegiate Athletic Association, 804 F.2d 953, 959 (6th Cir. 1986). The Fifth Circuit also recognizes the various sources for protection of those who seek relief in the courts. *See e.g., Ryland v. Shapiro*, 708 F.2d 967 (5th Cir. 1983) (privilege and immunities clause; first amendment right to petition; due process clause).

Regardless of the precise textual source of the protection of those who seek judicial review of government decision-making,

> [t]he right of access to the courts is basic to our system of government, and it is well established today that it is one of the fundamental rights protected by the Constitution.

Id. at 971.

While each of the various legal theories are addressed separately, the common theme of all must not be lost—that resort to judicial procedures must be offered on equal terms regardless of the various constitutional provisions under which it is analyzed. Contrary to this fundamental principle, the Washington court decisions require the imposition of an attorney fee penalty on those who seek relief from a government regulatory decision in the Court of Appeals and happen to lose a nonfrivolous challenge.

A. THE WASHINGTON COURTS' DECISIONS CONTRADICT DUE PROCESS JURISPRUDENCE

The Fourteenth Amendment to the United States Constitution protects the right of "due process." Determining what process is due is the ageless task for the Court because these issues arise within a variety of contexts. Nevertheless, several decisions of this Court provide guidance into the firmly rooted protection of those who resort to the courts looking for a process whereby government action may be reviewed. The Washington Courts, however, have approved a mandatory penalty which conflicts with the basic tenets of due process jurisprudence.

In the landmark case of In *Ex Parte Young*, 209 U.S. 123 (1908), this Court considered a state statute which provided no judicial review of an administrative decisions setting railroad freight rates unless someone violated those decisions and faced a penalty for doing so.

> If the law be such as to make the decision of the legislature or of a commission conclusive as to the sufficiency of the rates, this court has held such a law to be unconstitutional. ... A law which indirectly accomplishes a like result by imposing such conditions upon the right to appeal for judicial relief as work an abandonment of the right rather than face the conditions upon which it is offered or may be obtained is also unconstitutional.

Id. at 448-49.[5]

Shortly thereafter, this Court in *Missouri Pacific Railway Co. v. Tucker*, 230 U.S. 340 (1913), reviewed a state statute which imposed $500 liquidated damages, plus attorneys' fees for those injured by a common carrier. Relying on *Ex parte Young*, this

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[5] *See Wagner Electric Corp. v. Thomas*, 612 F. Supp. 736, 743 (D. Kansas 1985) (applying *Young*).

Court held that the $500 plus attorneys' fees were litigation penalties which violated due process. The Washington statute at issue is similarly a penalty for seeking appellate judicial review.

The Washington Court's decisions conflict with the Tenth Circuit's approach to protection of litigants in judicial procedures. Access to the courts is a right "guaranteed by the Due Process Clauses of the Fifth and Fourteenth Amendments." *Silver v. Cormier*, 529 F.2d 161, 163 (10th Cir. 1976). The Tenth Circuit concluded: "This right of access to the courts cannot be infringed upon **or burdened.**" *Id.* (emphasis added). Nowhere should this be more true than where the litigant is seeking redress of grievances caused by government action.

The Washington Court held that WASH. REV. CODE § 4.84.370 does not violate due process because (1) there is no right to appellate review, (2) other statutes impose attorneys' fees on a losing party, and (3) the state's purpose to "discourage meritless appeals" trumps a private party's interest in being free from regulation in "economic matters." App. B, at 8.

First, the Washington Court was correct that, in some cases, appellate review is completely discretionary, such as small claims court or discretionary review by the State Supreme Court. But that is not the case here. A party in a land use decision has the right to appeal to the Washington Court of Appeals.

This Court has previously made clear that a person does not have an *absolute* right to an appeal in civil cases where no appeal procedure exists. *Lindsey v. Normet*, 405 U.S. 56, 77 (1972). The present case involves no such claim. However, when a state chooses to allow appeals as of right, as does Washington, the state cannot impose discriminatory or arbitrary limits *or penalties* on the exercise of those appeal rights. *Id.*

The importance of adjudicatory procedures is so significant that this Court has held that states may not create barriers which have the effect of penalizing litigants for exercising their opportunity to be heard. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-30 & n.5 (quoting *Boddie v. Connecticut*, 401 U.S. 371,

380 (1971)). The same is no less true when it comes to exercising the right to appeal.

Second, Washington, like other states, have other statutes which impose an attorney fee penalty on unsuccessful appellants. However, their purpose and effect are distinguishable. None apply to protect government from judicial review of regulatory decisions. These statutes are based on several legitimate and weighty state interests, not present with WASH. REV. CODE § 4.84.370. Such interests include encouraging arbitration, giving a complete remedy to those whose rights have been violated (42 U.S.C. § 1988), leveling the playing field when consumers are up against financial giants. *Ford Motor Co. v. Barrett,* 115 Wash. 2d 556, 569, 800 P.2d 367 (1990).

WASH. REV. CODE § 4.84.370 is not a remedy for frivolous appeals. [6] Nor is it designed to give the government a remedy for the violation of law or to penalize land use violators. The statute specifically does not apply to judicial review of land use *enforcement* proceedings, such as nuisance or code abatement, where the party opposing the government might be characterized as a law breaker. *See* WASH. REV. CODE § 4.84.370(1). The statute's only apparent purpose is to penalize those who seek to have government decisions on land use *permits* reviewed by a higher court. That purpose is not legitimate.

Unlike the automobile "Lemon Law" at issue in *Ford Motor,* which had the purpose of protecting financially vulnerable consumers in suits against automobile manufacturers, WASH. REV. CODE § 4.84.370 does not protect individuals in disputes with economic Goliaths. Rather, the statute advances an illegitimate purpose of shielding government from judicial review while it is the government which wields the power of regulations and publicly supported litigation counsel. Unlike the legitimate purposes in the

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[6] Like most jurisdictions, Washington has long had attorney fee penalties imposed for frivolous actions. *See* WASH. REV. CODE § 4.84.185 (App. M), WASH. RULES OF APP. PROC. 18.9 (App. N) and WASH. CIVIL RULE 11 (App. O). Therefore, WASH. REV. CODE § 4.84.370 was designed to penalize those claims like the Stearns' which are not frivolous, but are simply unsuccessful.

"Lemon Law", the contrary purpose of WASH. REV. CODE § 4.84.370 cannot justify under the due process clause this penalty on the appeal rights of citizens challenging government regulation.

Third, the Washington Court's conclusion is based on the assumption of a "strong presumption of constitutionality where a state regulating economic matters is challenged on equal protection or due process grounds." App. B, at 8.

The notion to the imposition of the attorney fee penalty as an "economic matter" conflicts with this Court's longstanding protection of individuals in the appellate processes. The burden does not become mere regulation of economic matters simply because the penalty is financial, anymore than a financial burden on free speech is any less a burden on free speech.[7]

Critically, at issue here is not merely an economic or property right, but the right of a citizen to exercise the right to participate in judicial processes on equal terms. *See Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966) (even though a poll tax is financial, it is unconstitutional).

If the "economic matter" is the Stearns' land, it must be noted that the statute applies with equal force to those who challenge government permit decisions on the basis of environmental, cultural or historical grounds. *See* Declaration of Richard Lindberg, App. L.

The Washington Courts have also created an insurmountable hurdle for litigants seeking to protect their federal Constitutional rights. Not only do they apply a presumption of constitutionality in relation to economic matters, the Washington Courts subjected the Stearns' constitutional challenges to a practically insurmountable burden of proof. Under the "Burden of Proof" heading of the Court's opinion, it states: "The party challenging the constitutionality of a statute bears the burden of

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[7] The Court recognized that the Stearns challenged the statute on the basis of the First Amendment and applied this "presumption of constitutionality" to the Stearns' First Amendment challenge.

proving it is unconstitutional **beyond a reasonable doubt**." App. B, at 5 (emphasis added).

This Court has never suggested that when constitutional rights are at stake, whether equal protection, due process, or, as here, the First Amendment, the one invoking the protection of the federal constitution is subject to the highest burden of proof. A governmental defendant is not entitled to the same protection and presumption of innocence as a criminal defendant. The Washington Court's imposition of this unreachable burden of proof effectively immunizes state government action from meaningful constitutional scrutiny.

The Washington Court's decisions in the Stearns' cases are contrary to due process jurisprudence expressed by other state courts. In *Murphy v. Commissioner of the Department of Industrial Accidents*, 415 Mass. 218, 612 N.E.2d 1149 (1993), the Massachusetts court evaluated whether a requirement that claimants with counsel pay a filing fee, but those without counsel do not pay a fee, violated the equal protection clause and the due process clause. *Id.* at 226 & n.14. Like the Washington Court's decision, the department defending the scheme countered by claiming that the classification "merely 'regulates economic activity' and does not infringe upon a fundamental right.'" *Id.*[8]

While most of the due process attention in recent days has been on administrative processes, the due process clause is fully applicable to judicial processes. Here, Washington has created a process which is constitutionally defective because it allows government and its supporters in judicial review of its regulatory decisions to be eligible for an attorney fee award, but imposes the

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[8] The department also argued that the purpose of the classification included deterring frivolous appeals and defraying costs of review. The Massachusetts court concluded that the classification did not withstand even the minimal, rational basis standard of review. *Murphy*, 425 Mass. at 227 (relying on *Lindsey*). There was no reason to believe that the fee penalty of some appellants was likely to deter only frivolous appeals, but would defer frivolous and non-frivolous appeals alike.

risk of paying solely on those who seek appellate review of the government's decision. This scheme violates due process.

B. THE WASHINGTON COURT'S DECISIONS CONFLICT WITH FIRST AMENDMENT RIGHTS INCLUDING THE RIGHT TO PETITION GOVERNMENT FOR REDRESS OF GRIEVANCES

The First Amendment explicitly protects the right to petition government for redress of grievances. U.S. Constitution, Amendment I. Under this amendment, lawsuits against the government are provided significant constitutional protection and this protection is applicable to state processes for petitioning government as well. *Meyer v. Grant*, 486 U.S. 414, 420 (1988). The right of access to courts is but one aspect of the right to petition government, and of free speech generally. *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (removing anti-trust liability for actions before adjudicatory bodies).[9]

First Amendment protection also finds support in the free speech clauses as well. "Litigation itself is a form of expression protected by the First Amendment," especially when, as in the present case, litigation involves the judicial review of government policies and practices. *In re Primus*, 436 U.S. 412, 426 (1978).[10] Likewise, the United States Supreme Court in *N.A.A.C.P. v. Button*, 371 U.S. 415 (1963), held that a Virginia law proscribing the

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[9] Although based on the Texas constitution, the Texas Supreme Court opinion in *Texas Association of Business v. Texas Air Control*, 852 S.W.2d 440 (Tex. 1993) is also demonstrative of closely guarded judicial protection of litigants who come before the courts. In *Texas Association of Business*, the court invalidated a statute that required that a litigant challenging environmental fines prepay penalties or post a supersedeas bond before a judicial appeal would be entertained.

[10] *See also Hoeber v. Local 30, United Slate, Tile & Composition Roofers, Damp and Waterproof Workers Association*, 939 F.2d 118 (3rd Cir. 1991) (injunction against litigation unconstitutional); *In re Halkin*, 598 F.2d 176 (D.C. Cir. 1979) (judicial process to enforce rights against government regulation is protected by the First Amendment).

solicitation of legal business was unconstitutional as it applied to the promotion of civil rights litigation. "[T]he First Amendment ... protects vigorous advocacy, certainly of lawful ends, against governmental intrusion." *Id.* at 429. Contrary to the Supreme Court's protection of advocacy in litigation, WASH. REV. CODE § 4.84.370 penalizes vigorous advocacy in the appellate courts.

> Access to the courts has long been recognized as a "fundamental constitutional" right. *Bounds v. Smith*, 430 U.S. 917 ... (inmate plaintiff); *see California Motor Transport*, ... ("right of access to the courts is ... one aspect of the right of petition"); *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 ... (1967) (right to petition is among the "most precious of liberties safeguarded by the Bill of Rights").

Craft v. Wipf, 836 F.2d 412 (8th Cir. 1987).

Moreover, public criticism of governmental policy and governmental decisions is at the very core of constitutionally protected free speech. *See Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966); *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). WASH. REV. CODE § 4.84.370 imposes a monetary penalty against those who unsuccessfully seek judicial review of local government land use decisions, whether they be the applicant, neighbors opposing the application, or environmental organizations. That penalty – paying the government's attorneys' fees – is imposed without any finding that their appeal or any position taken in the appeal is either malicious, frivolous, or even unreasonable. Clearly, this statute penalizes criticism of governmental land use decisions, which often involve contentious issues, yet such criticism in the nature of judicial review is crucial to the protection of First Amendment rights in a free society.

The Washington Court decisions conflict with the principle that government cannot require more money for permission to engage in expressive conduct on the basis of the general content of the expression. *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992). Yet, that is exactly what Wash. Rev. Code § 4.84.370

does in this case. It imposes a financial penalty on those who challenge government only on the subject of land use regulation.

In re Workers' Compensation Refund, 46 F.3d 813 (8th Cir. 1995) is directly contrary to the Washington Court's decisions in this case. The Eighth Circuit's case involved a statute which required insurers to pay for the cost of litigation, including attorneys' fees, for any action to review the validity or enforcement of a state law. The Court noted that this provision "acts at least as an indirect government impairment upon the insurance companies' right to petition the courts because it imposes a litigation penalty." *Id.* at 822. Consequently, the Court held that this attorney fee penalty violated the First Amendment. *Id.*

Consider also *Harrison v. Springdale Water & Sewer Commission*, 780 F.2d 1422 (8th Cir. 1986). There, the Court of Appeals considered whether a local government's counterclaim unconstitutionally deprived the petitioner of access to the courts. The petitioner alleged that the city's counterclaim was "a tactical move to put pressure on the Harrisons to settle their damage claim against the City." *Id.* at 1428.

> [O]fficials may not take retaliatory action against an individual designed either to punish him for having exercised his constitutional right to seek judicial relief or to intimidate or chill his exercise of that right in the future.

Id.[11]

The Seventh Circuit similarly views government retaliation for filing a lawsuit to be unconstitutional, but on free speech grounds. "Retaliation for filing a lawsuit is prohibited by the First Amendment's protection of free speech, not some concept of an

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[11] *Harrison* relied on *Silver v. Cormier*, 529 F.2d 161 (10th Cir. 1976). The Tenth Circuit ruled that the "right of access to the courts cannot be infringed upon or burdened," and that the official's threat burdened and chilled the plaintiffs' right of access even if the threat was "not actually effective." *Silver v. Cormier*, 529 F.2d at 163.

independent right of access to courts." *Zorzi v. County of Putnam*, 30 F.3d 885, 896 (7th Cir. 1994) (citations omitted).

The Ninth Circuit in *Sorrano's Gasco, Inc. v. Morgan*, 874 F.2d 1310 (9th Cir. 1989), also recognizes that "[t]he right of access to the courts is subsumed under the first amendment right to petition the government for redress of grievances."[12] *See also Valot v. Southeast Local School District Board of Education*, 107 F.3d 1220,1226 (6th Cir. 1997) (penalizing government employees for having exercised the right to petition government).

Relying on this Courts' ruling in *Bounds v. Smith*, 430 U.S. 917, the Fifth Circuit too held that "[a] mere formal right of access to the courts does not pass constitutional muster. Courts have required that the access be 'adequate, effective, and meaningful.'" *Ryland v. Shapiro*, 708 F.2d at 972.

The Second Circuit also recognizes that the use of judicial process by government to chill First Amendment freedoms can constitute a violation of constitutional rights. In *Greenwich Citizens Committee, Inc. v. Counties of Warren and Washington Industrial Development Agency*, 77 F.3d 26, 31 (2nd Cir. 1996), the plaintiffs were entitled to convince a jury that counterclaims were filed with the purpose of deterring the exercise of First Amendment freedoms. In contrast, Washington Courts do not allow the Stearns to make the same claim in response to the City's transparent attempt to chill the Stearns' from filing any appeal.

This Court should grant this petition to resolve the confusion in the law evidenced by the different treatment by the various courts of appeal and other state courts of the right of access to the courts to petition government for redress. The Stearns' cases

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[12] "Deliberate retaliation by state actors against an individual's exercise of this right [of access to the courts] is actionable under section 1983. *Franco v. Kelly*, 854 F.2d 584, 589 (2d Cir. 1988) (intentional obstruction of the right to seek redress 'is precisely the sort of oppression that ... section 1983 [is] intended to remedy')." *Sorrano's Gasco*, 874 F.2d at 1314 (citations omitted).

presented in this petition are especially appropriate because their grievances are based on actions of the government itself.[13]

C. WASH. REV. CODE § 4.84.370 AND THE CITY'S APPLICATION OF IT VIOLATES EQUAL PROTECTION

This Court has never held that one has an *absolute* right to appeal where the state provides no appeal remedy. However, this Court in *Lindsey v. Normet*, 405 U.S. 56, 31 L.Ed.2d 36, 92 S.Ct. 862 (1972), made clear that equal protection is denied if an appeal is offered, but not on equal terms.

WASH. REV. CODE § 4.84.370 violates equal protection of the laws because it imposes a penalty which operates only against governmental challengers in litigation in land use cases. Only the government and people who are aligned in defending the local government decision will be entitled to fees. Conversely, the same pro-government category of people will also always be immune from having to pay an opponent's fees. This self-serving statute violates the equal protection clause.

The Washington Court's decision conflicts with this Court's decision in *Romer v. Evans*, 517 U.S. 620 (1996). In *Romer*, this Court held that a state constitutional amendment which prohibited homosexuals from petitioning local government for local legislation to protect their interests failed even the lowest level of judicial scrutiny—the rational basis test. Similarly, in the present case, WASH. REV. CODE § 4.84.370 singles out a group of people – unsuccessful land use appellants – and penalizes them if they are unsuccessful on appeal.

The application of equal protection principles to litigants is not unique to the present case. "There can be no equal justice where the kind of a trial a man gets depends on the amount of money he has." *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (invalidating requirement that criminal defendant pay for transcripts

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[13] The Stearns are also entitled to declaratory relief under 42 U.S.C. § 1983 that this statute violates their constitutional rights.

for appeal), *quoted in Boddie v. Connecticut*, 401 U.S. 371 (1971) (Douglas, J., concurring). This case does not challenge the financial requirements of paying for transcripts or an initial filing fee as in *Griffin* or *Boddie*, but a much larger penalty. The City threatened the Stearns with an $11,000 penalty! App. B, at 3.[14]

Long ago, this Court in *Gulf, Colorado, & Santa Fe Railway Co. v. Ellis*, 165 U.S. 150, 41 L. Ed. 666 (1897), evaluated a strikingly similar attorney fee penalty. The statute at issue required a railroad which loses an action to recover on a debt to pay the attorneys' fees of the creditor.

> The act singles out a certain class of debtors and punishes them when for like delinquencies it punishes no others. . . . They cannot appeal to the courts as other litigants under like conditions and with like protection. If litigation terminates adversely to them, they are mulcted in the attorneys' fees of the successful plaintiff; if it terminates in their favor, they recover no attorneys' fees. It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. *They do not enter into the courts upon equal terms. They must pay attorneys' fees if wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties they are discriminated against, and are not treated as others. They do not stand equal before the law. They do receive its equal protection.*

Id. at 151 (emphasis added).

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[14] Because the Court of Appeals ruled that the City was entitled to attorneys' fees only for time spent on appeal, the City's threat to hold the Stearns responsible for over $11,000 in attorneys' fees in the trial court. However, the fee and expense penalty in the Court of Appeals was over $10,000 (App. P). The fee and expense penalty in *Stearns v. Gig Harbor* was over $6,000 (App. Q).

While the *Gulf* case involved an attorney fee provision that applied in the *trial court*, the Supreme Court expressly relied on an Alabama Supreme Court decision invalidating a statute imposing attorneys' fees on *appeal*. This attorneys' fee penalty on appeal denied equal protection of the law. *Id.* at 160-61 (quoting *North & South Ala. R. Co. v. Morris*, 65 Ala. 193 (1880)).

The instruction of this Court was unmistakable. Government cannot impose a penalty for appealing which only applies to a single class of litigants. This principle should apply with greater force because the favored party is the government and those agreeing with the government. The penalized party is always the private citizen or environmental organization who dares to seek judicial review of the government decision.[15]

There is no reasonable (or legitimate) grounds for giving government in litigation the opportunity to have its attorneys' fees paid by an unsuccessful opponent without creating a corresponding risk of liability to pay and the opportunity for the government opponent to receive an award of fees. The only conceivable purpose is to shield government from having its regulation of land being reviewed by an appellate court. Insulating government from judicial scrutiny is not a legitimate purpose.

The Washington Court's decisions are also contrary to the Massachusetts Supreme Court's equal protection analysis in *Murphy*.

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[15] *Gulf* was expressly relied on by the Colorado Supreme Court in a challenge to an attorney fee penalty in *More v. Johnson*, 193 Colo. 489, 568 P.2d 437 (Colo. 1977). The Colorado court held that the statute's provision of an attorney fee award only to a successful plaintiff in a forcible entry and detainer case violated equal protection.

> [B]y imposing a pecuniary penalty on one party for the benefit of his opponent without granting him a corresponding right, violates the defendants' Fourteenth Amendment right to the equal protection of law.

Id. at 441.

> It is an essential element of equal protection of the laws that each person shall possess the unhampered right to assert in the courts his rights, without discrimination, by the same processes against those who wrong him as are open to every other person. . . . No obstacles can be thrown in the way of some which are not interposed in the path of others.

Murphy, 415 Mass. at 233 (quoting *Bogni v. Perotti*, 224 Mass. 152, 156-67, 112 N.E.2d 853 (1916)).

The Washington Court of Appeals recognized that Section (2) of WASH. REV. CODE § 4.84.370 constitutes different treatment between governmental defendants and challengers of government. Nevertheless, it will take this Court to clarify that Washington's approach is directly contrary to this basic principle of American constitutional law.

II

THE WASHINGTON COURT'S DECISION ON THE RELATIONSHIP BETWEEN WASH. REV. CODE § 4.84.370 AND 42 U.S.C. § 1983 AND 1988 CONFLICTS WITH SUPREME COURT PRECEDENT

In Washington, like other states, challenges to land use decisions are often joined with civil rights claims under 42 U.S.C. § 1983.[16] This Court's interpretation of 42 U.S.C. § 1988 is unmistakable that a plaintiff who loses on the merits cannot be ordered to pay the governmental defendant's attorney's fees unless the plaintiff's position was frivolous. *Hughes v. Rowe*, 449 U.S. 5.

If the Supreme Court had not limited fee awards against plaintiffs, the result "would substantially add to the risks inhering in

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[16] *See, e.g., Lutheran Day Care v. Snohomish County*, 119 Wash. 2d 91, 829 P.2d 746 (1992); *Sintra, Inc. v. Seattle*, 119 Wash. 2d 1, 829 P.2d 765 (1992); *Hayes v. Seattle*, 131 Wash. 2d 706, 934 P.2d 1179 (1997).

most litigation and would undercut the efforts of Congress to promote vigorous enforcement" of the Civil Rights Act. *Id.* at 15 (quoting *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. at 422). Unfortunately for land use cases in Washington joined with Section 1983 claims, WASH. REV. CODE § 4.84.370 will just as effectively undercut the efforts of Congress because the one-sided attorney fee provision will discourage the prosecution of appeals in such cases.

This Court has also been clear that state laws cannot impede the Congressional purpose in enforcing the Civil Rights Act. In *Felder v. Casey,* 487 U.S. 136 (1988), the Supreme Court invalidated a state statute requiring litigants to file a claim with the government before litigating the claim against the government, because the state law stands "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id.* at 138 (citations omitted).

The statute at issue in *Felder* was egregious because it minimized government liability for

> **a reason manifestly inconsistent with the purposes of the federal statute: to minimize governmental liability.** Nor is this condition a neutral and uniformly applicable rule of procedure; rather, it is a substantive burden imposed only upon those who seek redress for injuries resulting from the use or misuse of governmental authority.

Id. at 141 (emphasis added).

The purpose of WASH. REV. CODE § 4.84.370 is obviously to discourage private litigants from appealing adverse land use decisions with the threat of paying the **government's** attorneys' fees. When land use cases are joined with Section 1983 claims, WASH. REV. CODE § 4.84.370 operates to frustrate the "remedial objectives" of Section 1983 by discouraging vigorous enforcement of the federal statute. *Id.* at 138.

CONCLUSION

Washington penalizes unsuccessful appellants who challenge land use decisions—land use applicants, neighbors opposing land use plans and environmental organizations—who have done nothing wrong and violated no law. Their only wrong is having unsuccessfully challenged a local government's land use decision in the Court of Appeals. This scheme, and the Washington Court's approval of it, conflicts with this Court's longstanding jurisprudence on due process, equal protection and the right to petition government for redress of grievances. Also in conflict are several federal circuits and state supreme courts, such as those of Colorado, Massachusetts, and Alabama.

Fairness and equal treatment in judicial processes are critical to a free society. This is especially true in cases where the judicial process is invoked to seek redress from the regulatory power of a government entity. The Stearns respectfully urge this Court to grant this petition and resolve the issues presented, which have deep roots in this country's unique system of checks and balances.

DATED: November 29, 1999

Respectfully submitted,

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APPENDIX A

THE SUPREME COURT OF WASHINGTON

GIG HARBOR MARINA, INC., a Texas corporation, d/b/a ARABELLA'S LANDING, and STANLEY and JUDY STEARNS, husband and wife, Petitioners, v. CITY OF GIG HARBOR, a municipal corporation, Respondent.	NO. 68243-7 **ORDER** C/A NO. 22906-4-II

Department I of the Court (Justice Durham and Justice Johnson recused and Justice Smith and Justice Alexander sat as Justices Pro Tem on Department I) considered this matter at its August 31, 1999, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 31st day of August, 1999.

/S/ Richard P. Guy
CHIEF JUSTICE

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

GIG HARBOR MARINA, INC., a Texas corporation, d/b/a ARABELLA'S LANDING and STANLEY STEARNS and JUDY STEARNS, husband and wife, Appellants, v. CITY OF GIG HARBOR, a municipal corporation, Respondent.	No. 22906-4-II PUBLISHED OPINION Filed: March 26, 1999

ARMSTRONG, J. The City of Gig Harbor denied the Stearnses' proposed development of property. The Stearnses appealed to the superior court and joined a 42 U.S.C. § 1983 claim alleging the City violated their civil rights. The superior court affirmed the City's denial of the development, dismissed the § 1983 action and, finding the § 1983 action frivolous, awarded attorney's fees to the City. The Stearnses filed this appeal and the City now seeks attorney's fees under RCW 4.84.370, which allows attorney's fees in land use cases to petitioners who have substantially prevailed in front of the local government, the trial Court, and the appellate court. The Stearnses contend that RCW 4.84.370 violates equal protection, due process, free speech and the right to redress grievances The Stearnses also challenge the dismissal of their 42 U.S.C. § 1983 claim and the trial court's finding that such claim was frivolous. Finally, the Stearnses contend that Gig Harbor misapplied its own ordinances concerning parking space requirements, permitted usage, and height

requirements. We hold the statute constitutional as applied here, but we reverse the award of attorney's fees based upon bringing a frivolous action. Otherwise, we affirm the trial court.

FACTS

Stanley and Judy Stearns own four and one-half lots in the City of Gig Harbor on which they operate a marina, Gig Harbor Marina, Inc., known as Arabella's Landing. These lots, zoned "Waterfront Millville," are currently developed with a marina service building, a duplex, and a single-family residence.

The Stearnses proposed to develop the site further with an office-retail building, a yacht club, and an open plaza. The Stearnses applied for site plan approval and for a conditional-use permit, which was required to develop the yacht club. The hearing examiner denied site plan approval because of inadequate on-site parking, but granted a conditional-use permit on condition the Stearnses provide additional parking. The Stearnses contested the City's method of calculating the parking, arguing that the City was misinterpreting its code. Under the Stearnses' interpretation of the code, the site had adequate parking.

The Gig Harbor City Council affirmed the site plan denial because of the parking inadequacy. In addition, the council found "the site plan is not consistent with the City's comprehensive plan," the proposed use was not "medium usage," and the proposed building did not comply with height restrictions in the Waterfront Millville zone. The city council reversed the grant of the conditional-use permit, finding that such a permit could not be granted if the site had inadequate parking.

The Stearnses filed a Land Use Petition in Pierce County Superior Court under the Land Use Petition Act (LUPA), RCW 36.70C. In July 1996, the trial court affirmed Gig Harbor's land use decisions and dismissed the Stearnses' petition.

Seven days after the petition was dismissed, the City filed a "Motion for Calculation of Attorneys' Fees Under RCW 4.84.370." The City asked the court to *"calculate* the amount of attorneys' fees that the City would be entitled to under RCW

4.84.370,[1] in the event this action is appealed and the City prevails on appeal." The City further stated that "a ruling at this time would simplify the issues on appeal and clarify the financial risks facing each party." The City accompanied this motion with two affidavits of counsel justifying $11,712 in attorney's fees.

After the Stearnses opposed the motion, the City withdrew it. The Stearnses then moved to amend their petition to add § 1983 claims; they alleged that the City had used the "motion to calculate attorney's fees under RCW 4.84.370" as a threat to deter the Stearnses' appeal of the Land Use Petition. The Stearnses contended that the statute was unconstitutional and that their proposed amendment sought a declaration of the rights and duties of the parties. The trial court allowed the amendment.

The Stearnses moved for summary judgment, and the City countered with a "Motion to Dismiss Damage Claims Under 42 U.S.C. § 1983 and 42 U.S.C. § 1988 With Prejudice." The trial court denied the Stearnses' motion for summary judgment, granted

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[1] RCW 4.84.37O provides:

Appeal of land use decisions-Fees and costs.

(1) Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use; variance, shoreline permit, building permit, site plan, or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:

(a) The prevailing party on appeal was the prevailing or substantially prevailing patty before the county, city, or town, or in a decision involving a substantial development permit under chapter 90.58 WASH. REV. CODE, the prevailing party on appeal was the prevailing party or The substantially prevailing party before the shoreline(s) hearings board; and

(b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all judicial proceedings

(2) In addition to the prevailing party under subsection (1) of this section, the county, city, or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal.

the City's motion to dismiss, and found that the § 1983 claims were frivolous. The City subsequently moved for attorney's fees under 42 U.S.C. § 1988, RCW 4.84.185, and CR 11; the trial court awarded $5,773.80 in fees against the Stearnses and their attorneys.

ANALYSIS

The City first contends that the constitutional issues are not ripe because no attorney's fees have been assessed against the Stearnses under RCW 4.84.370. The argument lacks merit in both actions[2] pending before this court involving the Stearnses and the City, the City has requested attorney's fees on appeal on the basis of RCW 4.84.370. This raises the question of whether the statute is constitutional.

A. Is RCW 4.84.370 Constitutional?

The Stearnses' constitutional challenges to the statute rest upon two propositions: (1) the burden created by the statute is not carried. equally by all litigants in land use cases, but only by those who challenge a local government's land use decision; and (2) while not absolutely denying the right to appeal, the statute chills the exercise of such right.

1. Equal Protection

a. *Standard of Review*

The legislative classification here defines a patty's liability for the attorney's fees and costs of the opposing party on appeal of a local land use decision. A party who prevails or substantially prevails is entitled to fees and costs, and the statute defines the concept of "prevailing party." Assuming the statute creates a classification that treats members of the same class differently, such classification "neither involves suspect criteria (race, religion, national origin, alienage, gender) nor affects fundamental interests ([e.g.], free speech, privacy, voting rights), [and] the court will engage in only minimum scrutiny of the enactments[.]" *American Network, Inc. v. Utilities and Transp. Comm 'n,* 113 Wn.2d 59, 77-78,

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[2] The other action filed in this court is *Stearns v. City of Gig Harbor, No.* 22912-9-II (March 26, 1999).

776 P.2d *950* (1989) (citation omitted) (footnote omitted). Statutes that regulate business and economic activities "carry a strong presumption of constitutionality." *American Network,* 113 Wn.2d at 78. And we will uphold such statutes if the classification created bears any rational relation to a legitimate state interest. *Seeley v. State,* 132 Wn.2d 776, 795, 940 P.2d 604 (1997). Stated slightly differently, such a classification will be upheld "'unless it rests on grounds wholly irrelevant to the achievement of legitimate state objectives.'" *State v. Coria,* 120 Wn.2d 156, 171, 839 P.2d 890 (1992) (quoting *Omega Nat 'l Ins. Co. v. Marquardt,* 115 Wn.2d 416, 431, 799 P.2d 235 (1990)).

b. *Burden of Proof*

The party challenging the constitutionality of a statute bears the burden of proving it is unconstitutional beyond a reasonable doubt. *Ford Motor Co. v. Barrett,* 115 Wn.2d 556, 563, 800 P.2d 367 (1990). The Stearnses thus bear the burden of proving all the elements of an equal protection violation. Initially, the Stearnses must show that the statute fails to afford like treatment to "persons similarly situated with respect to a legitimate purpose of the law . . ." *Coria,* 120 Wn.2d at 169 (citing *State v. Schaaf,* 109 Wn.2d 1, 17, 743 P.2d 240 (1987)). Next, if the Stearnses can show such disparate treatment, they must demonstrate that the difference lacks any rational basis and is "'purely arbitrary.'" *Coria,* 120 Wn.2d at 172 (quoting *Omega Nat'l Ins.,* 115 Wn.2d at 431).

c. *Does the Statute Benefit Only One Class of Litigants, i.e., Local Government?*

The statute is neutral on its face, i.e., it does not say that only local governments can recover fees on appeal. But not all facially neutral statutes are neutral in their application; some legislation denies equal protection by the manner in which it is applied. *See* 2 RONALD D. ROTUNDA, TREATIES ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.4, at 344 (1986); Examples of "as-applied" challenges are *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.,* 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977) (challenge to a facially neutral zoning decision), and *Washington v. Davis,* 426 U.S. 229, 96 S. Ct. 2040, 48 L. Ed. 2d 597(1976) (challenge to facially neutral police screening exam).

Stearnses contend that not all parties who appeal land use decisions are afforded like treatment under the statute. The Stearnses argue that because the government is both decision-maker and party at the local level, it will never appeal its own land use decision, and so, the government will never be the losing party at the first level. Thus, the Stearnses conclude, the government will never be assessed fees and costs under the statute because it will never lose at all levels.

But the Stearnses' argument rests upon an assumption not demonstrated by this record: that even assuming the City will never appeal its own decision, it is necessarily the prevailing or substantially prevailing party at the local level. The City poses an illustrative hypothetical. Suppose a city hearings examiner proves a proposed development, attaching three or more conditions. The developer appeals to the city council, which strikes all but one of the conditions; unless the stricken conditions were minor, the developer would have substantially prevailed in proceedings before the City. Then suppose the developer appeals the remaining condition to superior court, which strikes it; the developer would be the prevailing party in that judicial proceeding as well. Finally, suppose the City appeals the superior court's decision to the Court of Appeals, which affirms the trial court. The developer would be the substantially prevailing or prevailing party before the appellate court, the trial court, and the City and thus, the developer, not the City, would be entitled to attorney's fees and costs under the statute.

This construction is supported by paragraph (2) of the statute, which provides: "In addition to the prevailing party under subsection (I) of this section, the county, city, or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal." RCW 4.84.370(2).

Under the hypothetical, a developer who improved his or her position from the hearing examiner to the city council, but then failed to improve through the superior court and appellate court could argue under subsection (1) that the City is not entitled to fees because the developer prevailed at the city level. But subsection (2) makes clear that under these circumstances, the City is entitled to fees. A necessary corollary is that a developer who improves its position from the hearing examiner to the city council can in some

situations be considered to have prevailed or substantially prevailed. If the City were always the prevailing party at the council level, subsection (2) would not be necessary.

We conclude that the Stearnses have failed to carry their burden of showing that the statute, as applied, discriminates against land use applicants. Therefore, we need not engage in further equal protection analysis.

2. Due Process/First Amendment Right to Petition

The First Amendment includes the right to petition the government for redress of grievances. The Stearnses argue correctly that this right includes meaningful access to the courts. *In re Primus,* 436 U.S. 412, 426, 98 S. Ct 1893; 56 L. Ed. 2d 417 (1978); *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 510, 92 S. Ct. 609, 30 L. Ed. 2d 642 (1972). Then the Stearnses argue that because RCW 4.84.370 permits an award of attorney's fees to the government as prevailing party in a land use case but not to an applicant, the statute denies due process of law to applicants and impermissibly "chills" their First Amendment rights. As discussed above, this argument assumes a false premise -- that an applicant can never qualify for attorney's fees as a prevailing party.

In any event the statute does not keep an applicant from obtaining meaningful judicial review of a land use decision. The Stearnses went to superior court to challenge the City's denial of their development permit. And not all superior court decisions entitle the losing party to higher judicial review. For instance, the Rules of Appellate Procedure allow only discretionary review of superior court decisions in cases originating in the courts of limited jurisdiction. RAP 2.3(d). *See City of Seattle v. Hesler,* 98 Wn.2d 73, 653 P.2d 631 (1982). Likewise, in most cases, review by the Supreme Court is only at that court's discretion. RAP 4.2.

Other statutes and court rules also permit an award of attorney's fees and costs against a party who pursues an appeal beyond a certain level. *See, e.g.,* MAR 7.3 (party who appeals arbitration award and fails to improve position is liable for reasonable attorney's fees); RAP 18.9(a) (sanctions for frivolous appeal); RCW 10.73.160 (appellate costs, including fee for court-

appointed counsel, assessed against adult or juvenile criminal who *does not prevail on appeal).*

And due process does not guarantee the right to appeal. *Ford Motor,* 115 Wn.2d at 562. Rather, the State may impose a risk of attorney's fees beyond a certain level in the judicial process where "the balance of state and private interests favors the government scheme." *Ford Motor,* 115 Wn.2d at 569 (citation omitted). Here, the Legislature has determined that to discourage meritless appeals, a party appealing a land use decision beyond the superior court risks paying an opponent's fees. Given the strong presumption of constitutionality where a statute regulating economic matters is challenged on equal protection or due process grounds, we hold that the balance here favors the government scheme. RCW 4.84.370 does not unconstitutionally deny access to the courts.

3. Separation of Powers

The gist of this argument is that by enacting this attorney's fee statute, the Legislature has burdened and frustrated the judiciary's power of judicial review because only those who can afford the other side's attorney's fees will appeal local land use decisions. This ignores the longstanding rule in this state that a party can recover attorney's fees only when authorized by *statute,* contract, or recognized ground in equity. And the Legislature has enacted many statues that authorize the recovery of attorney's fees. This is a common legislative function, not the province of the courts.

Moreover, the Stearnses have not demonstrated how the statute affects the powers of the court. While the statute may "chill" some cases in which the courts might overturn the actions of local government, the Stearnses have not cited a single case as to how this interferes with the powers of the judiciary. In those cases that reach the court, the court's powers are unchanged.

B. Conflict with 42 U.S.C. § 1983 and 42 U.S.C. § 1988.

The Stearnses contend that RCW 4.84.370 conflicts with, and is thus preempted by, 42 U.S.C. § 1983 and § 1988. These latter statutes provide a cause of action for the violation of federal constitutional and statutory rights, and for attorney's fees to the

prevailing party. Because civil rights claims often accompany, or are part of land use petitions, the Stearnses contend that the statutes conflict.

"Preemption may occur if (1) Congress passes a statute that expressly preempts state law, (2) Congress occupies the entire field of regulations, or (3) state law conflicts with federal law, making compliance with both an impossibility or state law presents an obstacle to the accomplishment of a federal purpose." *Stevedoring Servs. of Am. v. Eggert,* 129 Wn.2d 17, 23, 914 P.2d 737 (1996) (citation omitted). The Stearnses have not claimed that § 1983 or § 1988 expressly preempts RCW 4.84.370, or that Congress occupied the entire field of land use law. Rather, the Stearnses' claim that RCW 4.84.370 presents an obstacle to the accomplishment of a federal purpose.[3]

The Stearnses cite *Felder v. Casey,* 487 U.S. 131, 108 S. Ct. 2302, 101 L. Ed. 2d 123, (1988), in which the United States Supreme Court invalidated a statute requiring litigants to file a claim against a local government before litigating any claim against the government, including § 1983 claims. Litigants who did not file such a claim in the proscribed time period were barred from filing-suit. *Felder* is distinguishable. There, the statute barred the claim. Here, the statute does not bar an appeal past the superior court; it only imposes fees on an appellant who is unsuccessful for the third time.

The Stearnses contend that the "chilling effect" of RCW 4.84.370 will deter people from bringing the takings claims[4] that accompany land use petitions. This potential "chilling effect" was of concern to the United States Supreme Court when it limited the attorney's fees defendants could recover under § 1983 and § 1988 to those suits where the plaintiff's claims were "frivolous,

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[3] Section 1983 and § 1988 will never apply in the same case as RCW 4.84.370 because by definition the government would have to lose litigation to be susceptible to attorney's fees under § 1988, while the government must win litigation to receive attorney's fees under RCW 4.84.370.

[4] A takings claim is a claim that the government has taken private property for public use without paying just compensation. U.S CONST., amend. V.

unreasonable, or without foundation." *Hughes v. Rowe,* 449 U.S. 5, 14, 101 S. Ct. 173, 66 L. Ed. 2d 163 (1980) (citing *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 421, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978)).

The Court held that:

> "To take the further step of assessing attorneys fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII"

Hughes, 449 U.S. at 14-15 (quoting *Christiansburg Garment,* 434 U.S. at 422).[5]

But a land use applicant is not required to join any potential § 1983 and § 1988 claims with a petition to review a governmental land use decision. Such claims may be brought in a separate action not subject to the fees provision of RCW 4.84.370. Further, even if the claims are joined, RCW 4.84.370 authorizes an award of fees on appeal only of a governmental "land use approval or decision." Thus, where a land use petition is joined with § 1983 or § 1988 claims, attorney's fees can be awarded under RCW 4.84.370 only for the land use portion of the action.

In conclusion, the Stearnses have failed to show that RCW 4.84.370 is unconstitutional as applied. The City is entitled to reasonable attorney's fees incurred after the appeal from the superior court.[6]

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington

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[5] While *Christianburg* dealt with Title VII of the Civil Rights Act of 1964, the case citing it, *Hughes v. Rowe,* adopted the same standard for § 1983 and § 1988, expressing identical concerns. *Hughes v. Rowe,* 449 U.S. 5, 14-15, 101 S. Ct. 173, 66 L Ed. 2d 163(1980).

[6] We have recently held that RCW 4.84.370 only provides for an award of attorney's fees incurred before the Court of Appeals or the Supreme Court. *Baker v. Tri Mountain,* No. 20905-5-II (filed March 22, 1999).

Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

. . .

/S/ Armstrong J.
Armstrong, J.

We concur:

/S/ Bridgewater, C.J.
Bridgewater, C.J.

/S/ Hunt, J.
Hunt, J.

APPENDIX C

THE SUPREME COURT OF WASHINGTON

STANLEY and JUDY STEARNS, husband and wife; and GIG HARBOR MARINA, INC., a Texas corporation, d/b/a ARABELLA'S LANDING,	)	NO. 67950-9
Petitioners,	)	**ORDER**
v.	)	C/A NO. 22912-9-II
CITY OF GIG HARBOR, a municipal corporation,	)	
Respondent.	)	

Department I of the Court (Justice Durham and Justice Johnson recused and Justice Smith and Justice Alexander sat as Justices Pro Tem on Department I) considered this matter at its August 31, 1999, Motion Calendar, and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 31st day of August, 1999.

/S/ Richard P. Guy
CHIEF JUSTICE

APPENDIX D

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

STANLEY and JUDY STEARNS, husband and wife, and GIG HARBOR MARINA, INC., a Texas corporation, d/b/a ARABELLA'S LANDING Appellants, v. CITY OF GIG HARBOR, a municipal corporation, Respondent.	No. 22912-9-II UNPUBLISHED OPINION Filed: March 26, 1999

ARMSTRONG, A.C.J. -- The Stearnses filed a site plan application to develop property in the City of Gig Harbor. But the Stearnses did not file a building permit. After the site plan application was complete but before the public hearing on it, the City changed its municipal code in several ways that affected the application. The city hearing examiner then denied the Stearnses' application, finding that it did not meet the requirements of the amended city code. The Stearnses appealed to the superior court, which affirmed the City. The principal issue is whether the Stearnses had a vested right to have the site plan application evaluated on the basis of the city code as it existed at the time of the site plan application. We hold that the site plan application did not vest the Stearnses' rights; rather, under the city code, the Stearnses were required to file a building permit application to vest their rights. Accordingly, we affirm.

FACTS

The Stearnses own four-and-one-half contiguous lots on the Gig Harbor waterfront, comprising 1.7 acres upland and 1.3 acres tidelands. The Stearnses applied for approval of a site plan for the development of a building for marine-related retail use and professional office space as allowed by Gig Harbor Municipal Code (GHMC) 17.48.020. The permit application was submitted November 13, 1995, along with payment of the $600 filing fee.

The site plan application is on a form also used for conditional use permits, variances, site plan review, planned unit development, rezone, and administrative appeals. The GHMC required the application to include submission of a SEPA environmental checklist, vicinity map, site plan, topographic map, landscape plan, general utility plan, and specifications for the building elevations and architectural style. A written description of the proposed project known as a "Declaration of Intent" was submitted along with these materials.

The site plan proposed a building with 7,210 square feet of indoor space and an additional 4,840 square feet of open pedestrian plaza and walkways. The proposal included the dedication of four 30-foot moorage slips to the public for the purpose of satisfying the water view/water access amenities in exchange for exceeding the 16-foot city building-height limitation. GHMC 17.48.060.

With the submission of some additional items requested by the City, the application was complete on January 11, 1996. A hearing was scheduled, with public comment, on March 20, 1996.

On March 11, 1996, a newly adopted city ordinance (Ordinance No.716) became effective. The ordinance changed the City's municipal code in two ways: (1) the ordinance established a 3,500 square foot lot maximum gross floor area for commercial buildings in the Waterfront Millville zone, *see* GHMC 17.48.040; and (2) the ordinance amended the water view/access requirement so that instead of being able to satisfy the requirement with two access opportunities (the dedicated moorages), the Stearnses would have to supply one access and one view opportunity, *see* GHMC 17.48.060.

Following the March 20 public hearing, the City of Gig Harbor hearing examiner ruled that the site plan did not meet these new requirements, and denied approval. The hearing examiner also held that the site plan application did not vest any right to consideration under the prior statutory scheme. The city council affirmed the hearing examiner.

The Stearnses appealed to the Pierce County Superior Court under the Land Use Petition Act, RCW36.70C. The trial court affirmed the city council.

ANALYSIS

A. Background on Vested Rights

Under the vested rights doctrine, a developer who files a timely and complete building permit application has a right to have its application processed according to the ordinances in effect at the time of the application. *West Main Assocs. v. City of Bellevue,* 106 Wn.2d 47, 50-51, 720 P.2d 782 (1986). This allows developers to "fix" the rules that will govern their development. *See* Frederick D. Huebner, Comment, *Washington's Zoning Vested Rights Doctrine,* 57 WASH. L. Rev. 139, 147-50 (1981), *cited in West Main Assocs.*, 106 Wn.2d at 51.

The key is establishing a date certain. By promoting a date certain vesting point, our doctrine insures "that new land-use ordinances do not unduly oppress development rights, thereby denying a property owner's right to due process under the law." *Valley View Indus. Park v. City of Redmond,* 107 Wash.2d 621, 637, 733 P.2d 182 (1987). The date certain allows a developer, by filing the correct permit application, to "freeze" the applicable land use statutes.

B. Site Plan Vesting

Washington's vested-rights doctrine has been applied in the context of many land use permits.[1] But filing a site plan

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[1] *Noble Manor Co. v. Pierce County,* 133 Wn.2d 269, 943 P.2d 1378 (1997) (short plat subdivision application); *Friends of the law v. King County,* 123 Wn.2d 518, 869 P.2d 1056 (1994) (preliminary plat application); *Ford v. Bellingham-Whatcom*

application alone will not vest the developer's rights if the pertinent code allows the developer to fix a date certain by filing a building permit. *Erickson & Assocs. Inc. V. McLerran,* 123 Wn.2d 864, 872 P.2d 1090 (1994).

In *Erickson,* the developer applied for a Master Use Permit (MUP)[2], but did not apply for a building permit. Seattle regulated vesting through the following ordinance:

> Seattle Municipal Code 23.76.026, "Vesting of development rights"...
>
> Applications for all master use permit components except subdivisions and short subdivisions shall be considered under the Land Use Code and other land use control ordinances in effect on the date a fully complete building permit application, meeting the requirements of Section 302 of the Seattle Building Code, is filed. Until a complete building permit application is filed, such Master Use Permit applications shall be reviewed subject to any zoning or other land use control ordinances that become effective prior to the date that notice of the Director's decision on the application is published, if the decision can be appealed to the Hearing Examiner, or prior to the date of the Director's decision if no Hearing Examiner appeal is available.

County Dist. Bd. of Health, 16 Wn. App. 709, 558 P.2d 821(1977) (septic tank permit); *Talbot v. Grey,* 11 Wn. App. 807,525 P.2d 801(1974) (shoreline substantial development permit); *Juanita Bay Valley Community Ass 'n v. City of Kirkland,* 9 Wn. App. 59, 510 P.2d 1140 (1973) (grading permit); *Beach v. Board of Adjustment,* 73 Wn.2d 343, 438 P.2d 617 (1968) (conditional use permit).

[2] The parties in the present case agree that the Master Use Permit requirements in *Erickson* are substantially similar to the site plan application requirements in the City of Gig Harbor.

SMC 23.76.026; *quoted in Erickson.* 123 Wn.2d at 868-69. Thus, according to *Erickson,* "[u]nder the Seattle ordinance, vesting occurs either (1) when a developer files a complete building permit application at any point in the MUP permitting process (known as a 'combined MUP'), or (2) when the MUP is issued by the City, even if no building permit has been submitted (known as a straight MUP)" *Erickson,* 123 Wn.2d at 869. The court held that because this statutory scheme permitted the developer to determine the "date certain" when vesting would occur, the statutory scheme was constitutional. *Erickson,* 123 Wn.2d at 870.

The Stearnses rely on *Victoria Tower Partnership v. City of Seattle,* 49 Wn. App. 755, 745 P.2d 1328 (1987), arguing that an MUP can vest development rights. But *Victoria Tower* was decided five years before Seattle adopted the vesting ordinance discussed in *Erickson.* And *Erickson* distinguished the case on this basis. Thus, *Victoria Tower* is inapplicable where the vesting ordinance, as in *Erickson,* allows the developer to "fix" the rules by filing a building permit.

C. Gig Harbor's Vesting Scheme

While Seattle explicitly told developers that they must file a building permit in order to vest their MUPs, Gig Harbor was not so explicit. Gig Harbor's vesting provision is contained in the Municipal Code chapter adopting the Uniform Building Code, and states:

> A. A valid and fully complete building permit application for a structure that is permitted under the zoning or other land use control ordinance in effect on the date of the application shall be considered under Title 15 of the Gig Harbor Municipal Code in effect at the time of application and the zoning or other land use control ordinances in effect on the date of application.

GHMC 15.06.050.

This provision must be read alongside the provision governing site plans in the chapter governing areas zoned "Waterfront Millville (WM)." This section reads: "Before a

building permit will be issued in a WM zone, the site plan review process specified in Chapter 17.96 GHMC shall be followed." GHMC 17.48.050. In addition, the chapter of the GHMC governing site plans states: "Site plan review and approval shall be required prior to issuance of a building permit when provided under this chapter. Site plan review shall be required for the following:

A. All new nonresidential uses for the location of any building...." GHMC 17.96.020.

Under these provisions, a building permit will not be *issued* until the site plan review process has been completed. But a developer is not prevented from *applying* for a building permit during the site plan review process. And it is the application for the building permit that vests the developer's rights. *Hull v. Hunt*, 53 Wn. 2d 125, 130, 331 P.2d 856 (1958). We conclude that the Gig Harbor code allows a developer to fix a date-certain by filing a building permit. Thus, filing the site plan application did not vest the Stearnses' rights to have their application processed by the code in effect at the time of the filing.

D. Supplementing the Record

The Stearnses have attached to their appellate brief copies of internet pages posted at the City's web site. These suggest that building permit applications will not be *accepted* unless they include materials that can only be obtained from a site plan which has *received* city approval:

> The following items are required for submittal of an application for a building permit. Plans and application will not be accepted if the information is incomplete.
>
> ....
>
> • A plot plan which reflects conditions of approval through the Site Plan Review process and any other City and State requirements ....

> ....
> .... [E]levations and other details which reflect the conditions of approval through the Site Plan Review process and any other City and State requirements.

http ://www.harbornet.com/gigharbor/permits.html.
http ://www.harbomet.com/gigharborl/com-bro.htrnl.

These web pages are part of the City of Gig Harbor's web site and are designated "Client Assistance Memos." The cover page states: "The following Client Assistant Memos are designed to help you comply with City zoning, building, fire and sign codes."
http ://www.harbornet.corn/gigharbor/planning.htrnl.[3]

The Stearnses contend that these public statements show that, while the City's ordinances do not prevent applications for building permits before site plan approval, the City does so in its representations to the public. Both of these web pages indicate that a developer must submit the "conditions of approval" of the relevant site plan in order for an *application* for a building permit to be complete, and that incomplete applications will not be accepted. Presumably, the "conditions of approval" are not determined until the site plan has been approved. If this is so, then a developer could not vest his rights until after the site plan process had been completed.

But because these web site documents were not a part of the record before the city council and the superior court, a commissioner of this court ordered them stricken. The Stearnses now ask us to modify the commissioner's ruling. The Stearnses suggest that we can take judicial notice of the documents as legislative facts.

A court can take judicial notice of legislative facts. 5 KARL B. TEGLAND, WASHINGTON PRACTICE, EVIDENCE

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[3] The site addresses changed in the time between the filing of the Appellant's reply brief and oral argument. However, the new sites were reviewed on August 24 and *25,* 1998, shortly before oral argument, and the content of the sites was unchanged from the earlier versions printed in the Appellants' reply brief.

§§ 41,49 (2d ed. 1982), *cited in In re Marriage of Campbell,* 37 Wn. App. 840, 845, 683 P.2d 604 (1984). Legislative facts are "the sort of background information a judge takes into account when determining the constitutionality or proper interpretation of a statute, extending or restricting a common law rule, or the like." TEGLAND, *supra* at § 49. Thus, a court can take judicial notice of Senate Judiciary Committee letters and memos to ascertain legislative intent. *Seattle Times Co v. Benton County,* 99 Wn.2d 251, 255 n.l, 661 P.2d 964, 40 A.L.R.4th 322 (1983); *see also General Tel Co. of Northwest, Inc. v. City of Bothell,* 39 Wn. App. 453, 459,693 P.2d 215 (1985), *rev 'd on other grounds,* 105 Wn.2d 579 (1986). Here, the web pages do not shed light on the legislative intent of the city council. Rather, they show, at best, staff interpretation of the code. These are not legislative facts of which we can take judicial notice.

Moreover, the Stearnses appealed to the superior court under the provisions of the Land Use Petition Act, RCW 36.70C. The Act allows the administrative record to be supplemented by motion.[4] The Stearnses, however, did not move to supplement the record. And the record before us does not show that the Stearnses have grounds to supplement it. We decline to take judicial notice of the web pages.

E. Did the Stearnses' Proposal Conform to the New Requirements?

The Stearnses claim that their site plan conformed to new zoning standards. The alleged deficiencies in the site plan were: (1) the 7,500 square feet of floor area exceeded the limit of 3,500 square feet per lot, *see* GHMC 17.48.040; and (2) the proposal failed to satisfy the new requirement of one water view amenity and one water access amenity in exchange for relief from a height limitation, *see* GHMC 17.48.060.

The City acknowledged that the Stearnses' four-and-one-half contiguous lots would permit them to build four structures,

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[4] See RCW 36.70C.120(2).

one per lot, each with 3,500 square feet of gross floor area.[5] The City would not permit the Stearnses to aggregate the square footage limits for the four contiguous lots, noting that even if the new code provision was ambiguous regarding aggregation of square footage limits on contiguous lots, the proposed structure would still have to meet the setback provisions for each lot.

The Stearnses argue that

> zoning ordinances are in derogation of the common-law right of an owner to use private property so as to realize its highest utility. Such ordinances must be strictly construed in favor of property owners and should not be extended by implication to cases not clearly within their scope and purpose.

Morin v. Johnson, 49 Wn.2d *275,* 279, 300 P.2d 569 (1956) (citations omitted).

But "[w]hen a statute or ordinance is unambiguous, construction is not necessary as the plain meaning controls." *McTavish v. City of Bellevue,* 89 Wn. App. 561, *565,* 949 P.2d 837 (1998) (citations omitted). When construction is necessary, "[w]ords are given their plain meaning unless a contrary intent appears." *Hollmann v. Corcoran,* 89 Wn. App. 323, 332, 949 P.2d 386 (1997) (citing *In re Estate of Little,* 106 Wn.2d 269,283,721 P.2d *950 (1986)).*

The plain meaning of "3,500 square feet per lot" is that each lot may contain a structure that does not exceed 3,500 square feet in gross floor area. While the parties discuss at length other

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[5] The Stearnses' assertion that "the City decided that the Stearns[es]' 4 and 1/2 lots is to be treated as one 'lot' for purposes of calculating maximum floor area" is not supported by the record. The City hearing examiner ruled that the four contiguous lots *could* be treated as one lot, with a limit of one building with 3,500 square feet or as four lots, each with a building of 3,500 square feet (so long as applicable setbacks were maintained).

provisions of the GHMC, such as those for impervious coverage and setbacks, such comparisons only serve to buttress the impression that this section of the code describes limits applied to each lot.

The City also contends the Stearnses failed to provide the required water view and water access amenities to receive relief from the height limitations in the zoning code, which provides: "Structures shall not exceed 16 feet in height. Additional height increase of up to eight feet maximum may be permitted for each structure if one additional waterview and one access opportunity are provided per structure per lot...." GHMC 17.48.060

It is undisputed that the Stearnses' proposed construction would be 24 feet tall. The Stearnses maintain that they provided the required amenities by dedicating four public moorage slips (which the City admits satisfies the water access requirement), and by providing a public viewing pier to satisfy the water view requirement.

The City contends that the pier was constructed to satisfy a previous alteration of a residence on the property to a height of 24 feet. A covenant executed between the City and Gig Harbor Marina, Inc., signed by Stan Stearns, as president, specifically states:

> Whereas, in Resolution No.395, the City Council approved Steams' proposal to provide a public fishing pier and transient moorage on the manna property as consideration required by GHMC Sec. 17.48.060 for an amendment of the site plan and an increase in the height of the residence on the marina property, which shall be no more than twenty-four feet in height, subject to the Marina's execution and recording of a covenant against the property; provided that further structures proposed for the marina property shall be subject to site plan review and shall meet the criteria set forth in GHMC Sec. 17.48.060.

The plain meaning of this agreement is that further structures to be built on the marina property would have to satisfy GHMC 17.48.060, including the height amenities contained in that ordinance. Thus the pier provided by the Stearnses does not satisfy the water view amenity required to relieve the current development proposal from the height limitations of GHMC 17.48.060.

F. Amicus Issues

Amicus Pacific Legal Foundation (PLF) contends that the Gig Harbor Municipal Code (GHMC) does not meet common-law vesting standards because the code itself does not explicitly state that right to review under applicable site plan regulations vests when one files a building permit application. The section of the code (GRMC 15.06.050A) that discusses vesting specifically talks about the vesting of a *building permit* under the "zoning or other land use control ordinances in effect on the date of application." Because Gig Harbor reviews zoning at the site plan stage, PLF argues that a person could file a building permit that would be "vested" under the ordinance, but still have their proposal disapproved because their *site plan* did not conform to zoning requirements.

A comparison of *West Main* to *Ericksen* answers this concern. In *West Main* the court said: "Under [the vested rights] doctrine, developers who file a timely and complete building permit application obtain a vested right to have their application processed according to the zoning and building ordinances in effect at the time of the application." *West Main,* 106 Wn.2d at 50-51. Contrast this language with that from *Erickson:* "Washington's doctrine of vested rights entitles developers to have a *land development proposal* processed under the regulations in effect at. the time a complete building permit application is filed, regardless of subsequent changes in zoning or other land use regulations." *Erickson,* 123 Wn.2d at 867-68 (citations omitted) (emphasis added).

Where *West Main* speaks only in terms of the specific permit (in this case a building permit) being vested under any explicit vesting provision, the *Erickson* case speaks of a *"land development proposal"* being "processed under the regulations in effect at the time a complete building permit is filed..." In using the "land development proposal" language, the Washington State

Supreme Court dictated that applying for a building permit vests all permits and review processes required in order to bring a given development proposal to fruition, including site plan review.

G. Attorney's Fees

The respondents ask for attorney's fees under RCW 4.84.370. This statute, passed in 1995, provides for the payment of attorney's fees on appeal if the prevailing party also prevailed before the county, city, or town, and prevailed in all prior judicial proceedings. RCW 4.84.370. Because the City prevailed at every level of administrative and judicial review, the City is entitled to its attorney's fees incurred after the appeal from superior court to this court.

In response, the appellants, in their reply brief; assert that RCW 4.84.370 is unconstitutional on several grounds.[6] We addressed and rejected all of the appellants' and amicus' arguments regarding the constitutionality of RCW 4.84.370 in the companion case, *Gig Harbor Marina, Inc. v. City of Gig Harbor*, appeal No. 22906-4-II (filed March 26, 1999).

Affirmed. The City is entitled to reasonable attorney's fees in an amount to be set by a commissioner of this court upon compliance with RAP 18.1[7]

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

/S/ Armstrong, A.C.J.
Armstrong, A.C.J.

We concur:

/S/ Seinfeld, J.
Seinfeld, J.

---

[6] These grounds include equal protection, due process, First Amendment, and separation of powers.

[7] We have recently held that RCW 4.84.370 only provides for an award of attorney's fees incurred before the Court of Appeals or the Supreme Court. *Baker v. Tri Mountain Resources, Inc.*, No. 20905-5-II (filed March 22, 1999).

/S/ Hunt, J.

Hunt, J.

APPENDIX E

WASH. REV. CODE § 4.84.370. Appeal of land use decisions-- Fees and costs

(1) Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:

(a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town, or in a decision involving a substantial development permit under chapter 90.58 RCW, the prevailing patty on appeal was the prevailing party or the substantially prevailing party before the shoreline[s] hearings board; and

(b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.

(2) In addition to the prevailing party under subsection (1) of this section, the county, city, or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal.

APPENDIX F

FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

APPENDIX G

Fourteenth Amendment to the United States Constitution

SECTION 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX H

42 U.S.C. § 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

APPENDIX I

42 U.S.C. § 1988.

(a) Applicability' of statutory and common law

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's fees

In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, the Religious Freedom Restoration Act of 1993, or Title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party. other than the United States, a reasonable attorney's fee as part of the costs.

(c) Expert Fees

In awarding an attorney's fee under subsection (b) of this section in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee.

APPENDIX J

WASH. REV. CODE § 36.70C.030.

(1) This chapter replaces the writ of certiorari for appeal of land use decisions and shall be the exclusive means of judicial review of land use decisions, except that this chapter does not apply to:

(a) Judicial review of:

(i) Land use decisions made by bodies that are not part of a local jurisdiction;

(ii) Land use decisions of a local jurisdiction that are subject to review by a quasi-judicial body created by state law, such as the shorelines hearings board or the growth management hearings board;

(b) Judicial review of applications for a writ of mandamus or prohibition; or

(c) Claims provided by any law for monetary damages or compensation. If one or more claims for damages or compensation are set forth in the same complaint with a land use petition brought under this chapter, the claims are not subject to the procedures and standards, including deadlines, provided in this chapter for review of the petition. The judge who hears the land use petition may, if appropriate, preside at a trial for damages or compensation.

(2) The superior court civil rules govern procedural matters under this chapter to the extent that the rules are consistent with this chapter.

APPENDIX K

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

GIG HARBOR MARINA, INC., a Texas corporation, d/b/a ARABELLA'S LANDING, and STANLEY STEARNS and JUDY STEARNS, husband and wife, Petitioners, v. THE CITY OF GIG HARBOR, a municipal – corporation, ROBERT FRISBIE, and PETER KATICH, Respondents.	No. 95-2-12783-1 DECLARATION OF STANLEY STEARNS

I, Stanley Stearns, declare:

1. I am a plaintiff in this action and I am an owner of Gig Harbor Marina, Inc., another plaintiff in this action.

2. I have read the City's Motion for Calculation of Attorneys' Fees, the Affidavit of Carol A. Morris on City's Motion for Attorneys' Fees under RCW 4.84.370; and the Affidavit of Howard F. Jensen on City's Motion for Attorneys' Fees under RCW 4.84.370.

3. I understand that the City has claimed that, if I file an appeal in this action to the Court of Appeals and I do not prevail, I will be responsible for paying the City $11,712.15 in addition to whatever reasonable attorneys' fees the City incurs in the Court of Appeals.

4. I also understand that the City withdrew its Motion for Calculation of Attorneys fees after my attorneys filed an objection to the City's motion. I also understand that, even though the City withdrew its motion, the City is still claiming that I will be responsible for paying the City's attorneys' fees if I appeal this action and do not prevail before the Court of Appeals.

5. I believe the purpose of the City's motion was to discourage me from filing an appeal with the potential threat of having to pay the City's attorneys' fees. I believe the purpose of the statute is to discourage individuals from seeking review in the Court of Appeals when local governments regulate private property and the regulation has been upheld by the Superior Court. That purpose is being fulfilled in the present case. Since I did not prevail before the Superior Court in the underlying land use claims, this statute discourages me from filing an appeal in this case if I would be forced to pay for the City's attorneys if I do not prevail.

6. My potential exposure under this statute for paying the City's attorneys' fees imposes a threat on me which would never apply to a party who agreed with the local government's decision in a land use matter. Consequently, I am far less likely to decide to appeal the Superior Court's denial of my claims because I cannot tell the future and know whether I will prevail on appeal. This is especially true because this statute will not entitle me to recover my attorneys' fees if I prevail in the Court of Appeals. The deck is stacked against me.

7. Even though I am convinced that I should prevail on appeal, the chance that I may not prevail and would be forced to pay at a minimum $11,712.15 has a chilling effect on my exercise of my rights to file an appeal. The prospect of having to pay for the City's attorney's at an undetermined amount causes me great consternation in deciding whether to appeal to enforce my rights.

I declare under penalty of perjury that the foregoing is true and correct and was executed by me on September 30th, 1996 at Gig Harbor, Washington.

/S/ Stanley Stearns
STANLEY STEARNS

APPENDIX L

SUPERIOR COURT OF THE STATE OF WASHINGTON

FOR PIERCE COUNTY

GIG HARBOR MARINA, INC., a Texas corporation, d/b/a ARABELLA'S LANDING, and STANLEY STEARNS and JUDY STEARNS, husband and wife, Petitioners, v. THE CITY OF GIG HARBOR, a municipal corporation, Defendant.	No. 95-2-12783-1 DECLARATION OF RICHARD LINDBERG

Richard Lindberg states:

1. I am above the age of 21 and competent to testify in this matter. The facts set forth in this declaration are based upon my personal knowledge.

2 I have been an officer and a designated representative of the Tracyton/South Central Valley Association ("T/SCVA") This association was organized as a nonprofit corporation to represent my family and other families in an area of Kitsap County between Bremerton and Silverdale on the east side of Dyes Inlet. Among other activities T/SCVA sought judicial review of a development known as Mosher Creek Plat and Planned unit Development, ("PUD"). See Tracyton/South Central Valley Community Association v. Kitsap County, et al., King County Superior Court Cause No. 94-2-23946-5.

3. Among other reasons the plat and planned unit development approvals were challenged on grounds that the project site had not been properly zoned for the development. On this ground T/SCVA prevailed and the court (Judge Steven Scott) remanded the matter back to the county for the proper adoption of zoning that would support the density of the proposed

development. However, the court did not invalidate the preliminary plat and PUD approvals themselves, which approvals had been predicated upon the zoning having been properly enacted, which of course the court found not to be the case. T/SCVA then appealed the preliminary plat and PUD approvals to the Court of Appeals on grounds that those approvals had been unlawfully granted for reasons that they were not supported by lawfully enacted zoning. See Tracyton, etc., v Kitsap County et al. Court of Appeals No. 36825-1. The applicant for the plat and PUD filed a cross appeal of the court's invalidation of the zoning.

4. On remand the Kitsap County Commissioners simply readopted the prior zoning for the plat and PUD. T/SCVA contended that this was improper for reason that the prior zoning categories had by that point been rescinded and that the earlier rezone application did not vest the applicant to the former zoning code. Since Judge Scott had retained jurisdiction these issues were brought back before him. See Tracyton, etc., Kitsap County et al, King County Superior Court No. 95-2-21749-4. In his review of the county's actions on remand, Judge Scott upheld the zoning enactment.

5. At this point T/SCVA carefully considered taking an appeal of Judge Scott's affirmation of the county zoning approval on remand and consolidating that challenge with its pending appeal. In this posture the case would have presented two issues upon which statutory and case law supported TJSCVA's positions.' 1) whether approvals of a preliminary plat and PUD must conform with existing zoning; and 2) whether an application for a rezone vests an applicant to zoning in effect upon the date of application. T/SCVA had taken the position that neither the plat nor the PUD could be approved *unless it complied with* lawfully enacted zoning, relying upon RCW 58.17.195 and Friends of the Law v King County, 123 Wn. 2d 518, 523, 869 P.2d 1056 (1994). In its challenge to the decision on remand, T/SCVA took the position that the applicant could not vest to the former zoning categories because a rezone application does not create vested rights, as held by the court in Teed v. King County, 36 Wn. App. 635, 644, 677 P.2d 179 (1989). In other words, T/SCVA believed that it had not only good, but compelling grounds for appeal.

6. However, between the filing of Judge Scott's first decision and the rendering of his decision on remand, Section 718 of Ch. 347 (Laws of 1995) went into effect, providing in summary that the substantially prevailing parties on appeal would be

awarded their attorney fees in the event that those parties also substantially prevailed before the local government and the trial court. Because Kitsap County and the plat and PUD applicant were ultimately the prevailing parties in Superior Court a loss before the Court of Appeals could have rendered T/SCVA liable for costs and attorney fees for both the county and the applicant. Despite the strength of the appeal this was a risk that the directors and members of T/SCVA were unwilling to take. Accordingly, no appeal of Judge Scott's decision on remand was taken and the pending appeal was voluntarily dismissed.

7. Sec. 718 had a definite chilling effect upon our ability to pursue these issues to a final resolution. Moreover, in any case the effect of Section 718 is patently unjust, because by definition it will always be directed against one who seeks redress of grievances against a governmental agency and it will always insulate the governmental agency *and those* whose interests - are allied with governmental agencies.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 7th day of September, 1996 at Bremerton, Washington.

/S/ Richard E. Lindberg

Richard E. Lindberg

APPENDIX M

WASH. REV. CODE § 4.84.185. Prevailing party to receive expenses for opposing frivolous action or defense

In any civil action, the court having jurisdiction may, upon written findings by the judge that the action, counterclaim, cross-claim, third party claim, or defense was frivolous and advanced without reasonable cause, require the nonprevailing party to pay the prevailing party the reasonable expenses, including fees of attorneys, incurred in opposing such action, counterclaim, cross-claim, third party claim, or defense. This determination shall be made upon motion by the prevailing party after a voluntary or involuntary order of dismissal, order on summary judgment, final judgment after trial, or other final order terminating the action as to the prevailing party. The judge shall consider all evidence presented at the time of the motion to determine whether the position of the nonprevailing party was frivolous and advanced without reasonable cause. In no event may such motion be filed more than thirty days after entry of the order.

The provisions of this section apply unless otherwise specifically provided by statute.

APPENDIX N

WASHINGTON RULES OF APPELLATE PROCEDURE, RULE 18.9

(a) Sanctions. The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or other authorized person preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court. The appellate court may condition a party's right to participate further in the review on compliance with terms of an order or ruling including payment of an award which is ordered paid by the party. If an award is not paid within the time specified by the court, the appellate court will transmit the award to the superior court of the county where the case arose and direct the entry of a judgment in accordance with the award.

(b) Dismissal on Motion of Commissioner or Clerk. The commissioner or clerk, on 10 days' notice to the parties, may (1) dismiss a review proceeding as provided in section (a) and (2) except as provided in rule 18.8(b), will dismiss a review proceeding for failure to timely file a notice of appeal, a notice for discretionary review, a motion for discretionary review of a decision of the Court of Appeals, or a petition for review. A party may object to the ruling of the commissioner or clerk only as provided in rule 17.7.

(c) Dismissal on Motion of Party. The appellate court will, on motion of a party, dismiss review of a case (1) for want of prosecution if the party seeking review has abandoned the review, or (2) if the application for review is frivolous, moot, or solely for the purpose of delay, or (3) except as provided in rule 18.8(b), for failure to timely file a notice of appeal, a notice of discretionary review, a motion for discretionary review of a decision of the Court of Appeals, or a petition for review.

(d) Objection to Ruling. A counsel upon whom sanctions have been imposed or a party may object to the ruling of a commissioner or the clerk only as provided in rule 17.7.

APPENDIX O

WASHINGTON CIVIL RULE 11. SIGNING OF PLEADINGS, MOTIONS, AND LEGAL MEMORANDA: SANCTIONS

Every pleading, motion, and legal memorandum of a party represented by an attorney shall be dated and signed by at least one attorney of record in the attorney's individual name, whose address and Washington State Bar Association membership number shall be stated. A party who is not represented by an attorney shall sign and date the party's pleading, motion, or legal memorandum and state the party's address. Petitions for dissolution of marriage, separation, declarations concerning the validity of a marriage, custody, and modification of decrees issued as a result of any of the foregoing petitions shall be verified. Other pleadings need not, but may be, verified or accompanied by affidavit. The signature of a party or of an attorney constitutes a certificate by the party or attorney that the party or attorney has read the pleading, motion, or legal memorandum; that to the best of the party's or attorney's knowledge, information, and belief, formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or legal memorandum is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or legal memorandum is signed in violation of this rule, the court, upon motion or upon its own initiative, may impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or legal memorandum, including a reasonable attorney fee.

APPENDIX P

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

GIG HARBOR MARINA, INC., et al, Appellants, v. CITY OF GIG HARBOR, Respondent.	No 22906-4-II RULING ON ATTORNEYS FEES

This court awarded Respondent City of Gig Harbor a reasonable attorney fee pursuant to RCW 4.84.370, and the City requests $19,456.09 in fees and $727 in costs. Appellants object to this amount, arguing that (1) the City is not entitled to fees incurred in an unsuccessful motion to dismiss; (2) the City is not entitled to fees incurred defending against claims other than the land use claims; and (3) the amount the City requests for work on a motion to extend time is unreasonable. These arguments are well taken. A reasonable fee is $10,278. This amount is to be set off by a *$500* sanction for the late filing of the affidavit of fees and expenses. Accordingly, it is hereby

ORDERED that Respondent City of Gig Harbor is awarded $9,778 in attorney's fees and $727 in costs.

DATED this 14th day of July, 1999.

/S/ Ernetta Weathersby
Court Commissioner

cc: Benjamin J Gantt

Robin L. Rivett
Anne M. Hawkins
Jeffrey M. Eustis
John M. Groen
Richard M. Stephens
Carol A. Morris
Howard F. Jensen

APPENDIX Q

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STANLEY and JUDY STEARNS, husband and wife; and GIG HARBOR MARINA, INC., a Texas corporation, d/b/a ARABELLA'S LANDING, Appellants, vs. CITY OF GIG HARBOR, a municipal corporation, Respondent.	No. 22912-9-II RULING ON ATTORNEY'S FEES

On July 12, 1999 this court allowed the City to file a late affidavit of attorneys fees, RAP 18.1(d), on condition the City pay a sanction of $500. This court has now reviewed the City's affidavit of fees and expenses. The amounts appear reasonable.

Award $6,040.72 in attorneys fees and expenses of $175.32. If the City has not paid $500 in sanctions, the amount of the fees shall be reduced to $5,540.72.

IT IS SO ORDERED.

DATED this 21st day of September, 1999.

/S/ Donald G. Meath
Court Commissioner

cc: Brent D. Boger
Richard M. Stephens
Carol A. Morris

Supreme Court, U.S.
FILED
JAN 24

(2)

No. 99-932

In the
Supreme Court of the United States
October Term, 1999

STANLEY and JUDY STEARNS, husband and wife, and GIG HARBOR MARINA, INC., a Texas Corporation, d/b/a ARABELLA'S LANDING MARINA,
Petitioners,

v.

CITY OF GIG HARBOR, a municipal corporation of the State of Washington,
Respondent.

GIG HARBOR MARINA, INC., a Texas Corporation, d/b/a ARABELLA'S LANDING MARINA, and STANLEY STEARNS and JUDY STEARNS, husband and wife
Petitioners,

v.

THE CITY OF GIG HARBOR, a municipal corporation,
Respondent.

On Petition for Writ of Certiorari to the Washington Supreme Court

REPLY TO RESPONSE TO PETITION FOR CERTIORARI

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No. 99-932

In the
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October Term, 1999

STANLEY and JUDY STEARNS, husband and wife, and GIG HARBOR MARINA, INC., a Texas Corporation, d/b/a ARABELLA'S LANDING MARINA,

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Attorneys for Petitioners

QUESTIONS PRESENTED FOR REVIEW

1. Whether a state statute which penalizes private parties who appeal government regulatory decisions by requiring them to pay the government's attorneys' fees on appeal interferes with First Amendment rights to petition government for redress of grievances and free speech and Fourteenth Amendment rights to due process and equal protection?

2. Whether a state statute which imposes attorneys' fees against a private party who files a nonfrivolous appeal in judicial review of local government regulatory decisions conflicts with 42 U.S.C. §§ 1983 and 1988?

3. Whether a government entity's threat to seek attorneys' fees against private parties which chills the exercise of their statutory right of appeal violates the private parties' constitutional rights, and thus, entitles them to declaratory relief under 42 U.S.C. § 1983?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW i

INTRODUCTION 2

I THE CITY SERIOUSLY MISTATES THE FACTS 2

II THAT THE STEARNS DID NOT SUCCUMB TO THE CHILLING OF THEIR RIGHTS DOES NOT MEAN THE CHILL IS NOT LEGALLY COGNIZABLE 4

III STATE LEGISLATION MUST STILL MEET THE REQUIREMENTS OF DUE PROCESS 7

IV THE CITY ADMITS THE PURPOSE OF WASH. REV. CODE § 4.84.370 IS TO DISCOURAGE APPEALS 8

V THE CITY IS A PROPER DEFENDANT IN THE SECTION 1983 CLAIM 9

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Armendariz v. Penman,
75 F.3d 1311 (9th Cir. 1996) 7

Bloch v. Ribar,
156 F.3d 673 (6th Cir.1998) 5

Brown v. Board of Education,
347 U.S. 483 (1954) 6

Cooter & Gell v. Hartmarx Corp.,
496 U.S. 384 (1990) 6

Crawford-El v. Britton,
93 F.3d 813 (D.C.Cir.1996) 5

DeBlasio v. Zoning Board of Adjustment,
53 F.3d 592 (3rd Cir. 1995) 7

Mendocino Environmental Center v. Mendocino County,
192 F.3d 1283 (9th Cir. 1999) 5

Missouri Pacific Railway v. Tucker,
230 U.S. 340 (1913) 7

Patel v. Penman,
103 F.2d 868 (9th Cir. 1996) 7

Pearson v. Grand Blanc,
961 F.2d 1211 (6th Cir. 1992) 7

Romer v. Evans,
517 U.S. 620 (1996) 10

Silver v. Cormier,
529 F.2d 161 (10th Cir. 1976) 5

Stanley v. University of Southern California,
178 F.3d 1069 (9th Cir. 1999) 6

Supreme Court of Virginia v. Consumers Union,
446 U.S. 719 (1980) 9

Tri County Industries, Inc. v. District of Columbia,
104 F.3d 455 (D.C. Cir. 1997) 7

Wolff v. McDonnell,
418 U.S. 539 (1974) 7

Yee v. City of Escondido,
503 U.S. 519 (1992) 2

STATUTES

42 U.S.C. § 1983 i
42 U.S.C. § 1988 i
WASH. REV. CODE § 4.84.370 ..... 2, 6, 8, 9

RULES

Supreme Court Rule 12(4) 4

No. 99-932

In the

Supreme Court of the United States

October Term, 1999

STANLEY and JUDY STEARNS, husband and wife, and GIG HARBOR MARINA, INC., a Texas Corporation, d/b/a ARABELLA'S LANDING MARINA,

Petitioners,

v.

CITY OF GIG HARBOR, a municipal corporation of the State of Washington,

Respondent.

GIG HARBOR MARINA, INC., a Texas Corporation, d/b/a ARABELLA'S LANDING MARINA, and STANLEY STEARNS and JUDY STEARNS, husband and wife

Petitioners,

v.

THE CITY OF GIG HARBOR, a municipal corporation,

Respondent.

On Petition for Writ of Certiorari to the Washington Supreme Court

REPLY TO RESPONSE TO PETITION FOR CERTIORARI

INTRODUCTION

The petitioners herein (the Stearns) file this reply to the new issues raised by the City of Gig Harbor's (City) Response to Petition for Writ of Certiorari (City's Response).[1]

I
THE CITY SERIOUSLY MISTATES THE FACTS

At issue in this case is the constitutionality of WASH. REV. CODE § 4.84.370. No less than three times in the City's Response, the City falsely claims that it never sought, nor obtained an award of attorneys' fees against the Stearns under this statute. City's Response at 8 ("attorneys' fees have not been imposed against Stearns under RCW 4.84.370 – and may never be imposed"); 16 ("[t]he City never sought an actual award of attorneys' fees under the statute,"); and 17 ("the City never sought – and may never obtain – an award of attorneys' fees under the statute").

To the contrary, the City sought attorneys' fees under WASH. REV. CODE § 4.84.370 and the Washington Court of Appeals awarded fees in both cases presented to this Court, *Stearns v. City of Gig Harbor* and *Gig Harbor Marina, Inc. v. City of Gig Harbor*. Appendix P to the Petition for Writ of Certiorari (Petition) is a true copy of the Washington Court of Appeals' decision in *Gig Harbor Marina, Inc.*, wherein it ruled:

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[1] The City's Response lists three "Questions Presented for Review" which are different than those presented by the petitioners. Since the City did not file a cross-petition for writ of certiorari, it is unclear by what authority it can raise different questions presented for review. After all, "[a] litigant seeking review ... possesses the ability to frame the question to be decided in any way he chooses." *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992).

> This Court awarded Respondent City of Gig Harbor a reasonable attorney fee pursuant to RCW 4.84.370.

App. P to Petition, at P-1.

Similarly, attached as Appendix D to the Petition is a true copy of the Washington Court of Appeals' decision in *Stearns v. City of Gig Harbor*, wherein it ruled:

> The respondents ask for attorneys' fees under RCW 4.84.370. ...
> ...
>
> The City is entitled to reasonable attorney's fees in an amount to be set by a commissioner of this court.

App. D to Petition, at D-12. The amount set by the commissioner is set forth in App. Q to the Petition.

The City's claim that it never sought and never obtained an award of attorneys' fees is patently false. The questions presented in the Petition are clearly ripe for this Court's review because the Washington Court of Appeals has already imposed the fee penalty on the Stearns.

Under the heading of "Opinion Below" in the City's Response at 1, the City claims that:

> Stearns has attached a copy of the Court of Appeals' in one of these unrelated cases as Appendix C to this Petition for Writ of Certiorari. It has absolutely no relevance to this case.

This statement, too, is untrue. Attached as Appendix C to the Petition is a copy of the Washington Supreme Court's denial of a petition for review in the lead case in this pending petition for certiorari. Attached as Appendix D to the Petition is the Court of Appeals' opinion in one of the two cases which are the very subject of this petition.[2]

Under the heading of "Counterstatement of the Case," the City states that the

> Superior Court ... granted the City's motion to dismiss Stearns' Section 1983 claim, finding that the Section 1983 claim was frivolous and awarding its attorneys' fees.

City's Response at 3. What the City left out renders the statement misleading. The Court of Appeals' **reversed** the lower court's imposition of sanctions for filing a frivolous claim. *See* Appendix to City's Response, at App. 16-17.

II
THAT THE STEARNS DID NOT SUCCUMB TO THE CHILLING OF THEIR RIGHTS DOES NOT MEAN THE CHILL IS NOT LEGALLY COGNIZABLE

The City raises the issue that the Stearns' rights to appeal were not chilled because they chose to appeal despite the threat of paying the City's attorneys' fees. However, the evidence of the chilling effect in Mr. Stearns' and Mr. Lindberg's declarations (App. K and L) was undisputed in the trial court.

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[2] The Stearns filed the Petition under the rule which allows a single petition to be filed for two judgments on identical issues. *See* Supreme Court Rule 12(4).

Moreover, the notion that the chill did not stop the Stearns from appealing does not mean that the chill did not exist. In *Silver v. Cormier,* 529 F.2d 161 (10th Cir. 1976), the Tenth Circuit ruled that the "right of access to the courts cannot be infringed upon or burdened," and that the official's threat burdened and chilled the plaintiffs' right of access even if the threat was "not actually effective." *Id.* at 163.

Other courts have come to the same or similar conclusion.

> Because it would be unjust to allow a defendant to escape liability for a First Amendment violation merely because an unusually determined plaintiff persists in his protected activity, we conclude that the proper inquiry asks "whether an official's acts would chill or silence a person of ordinary firmness from future First Amendment activities."

Crawford-El v. Britton, 93 F.3d 813, 826 (D.C.Cir.1996), *vacated on other grounds*, 520 U.S. 1273 (1997) (internal quotation marks and citation omitted); *see also Mendocino Environmental Center v. Mendocino County*, 192 F.3d 1283, 1300 (9th Cir. 1999); *Bloch v. Ribar*, 156 F.3d 673, 681 (6th Cir.1998) (plaintiff has stated retaliation claim by alleging that "adverse action caused them to suffer an injury that would chill people of ordinary firmness from continuing to engage in their constitutionally protected activity").

The chill on the Stearns affected them even though it did not stop them from continuing in their First Amendment protected activity. The government should not benefit from that fact. Yet, the chill *was effective* in the case referred to by Richard Lindberg in his declaration. *See* App. L to the Petition. As an environmental activist, Mr. Lindberg represents an important segment of society with often a more

than ordinary firmness. The undisputed fact that an environmental activist was effectively chilled demonstrates the harm of WASH. REV. CODE § 4.84.370.

Moreover, the Ninth Circuit has recognized the inherent chill in imposing attorneys' fees or even costs in civil rights litigation. Not only is the exercise of one's individual rights jeopardized, but also the development of the law.

> [T]he imposition of such high costs on losing civil rights plaintiffs of modest means may chill civil rights litigation in this area. While we reject Stanley's claims, we also note that they raise important issues and that the answers were far from obvious. Without civil rights litigants who are willing to test the boundaries of our laws, we would not have made much of the progress that has occurred in this nation since *Brown v. Board of Educ.*, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873 (1954).

Stanley v. University of Southern California, 178 F.3d 1069, 1080 (9th Cir. 1999) (remand to re-tax costs in light of chilling effect on advocacy).

This Court has come to the same conclusion about the obvious chilling effect of attorneys' fee awards in Rule 11 cases. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 393 (1990) (Rule 11 must be read in light of concerns it will "chill vigorous advocacy"). If Rule 11's deterrent of frivolous pleadings by attorneys must be carefully applied so as not to chill vigorous advocacy, how much more should that principle be applied in the cases like the present where the purpose is to deter *nonfrivolous* appeals of review of government decision-making.

III
STATE LEGISLATION MUST STILL MEET THE REQUIREMENTS OF DUE PROCESS

The City claims that substantive due process no longer exists by relying on two Ninth Circuit opinions—*Patel v. Penman*, 103 F.2d 868 (9th Cir. 1996) and *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1996), *cited in* City's Response at 5. The City exaggerates the holdings of these cases and fails to disclose that there is a decisive split in the circuits over the applicability of substantive due process. *See Pearson v. Grand Blanc*, 961 F.2d 1211 (6th Cir. 1992); *DeBlasio v. Zoning Board of Adjustment*, 53 F.3d 592 (3rd Cir. 1995); *Tri County Industries, Inc. v. District of Columbia*, 104 F.3d 455 (D.C. Cir. 1997).

Moreover, the rationale in *Armendariz* of viewing takings of property under the Takings clause of the Fifth Amendment, rather than the substantive due process clause of the Fourteenth Amendment, does not apply in this case. The Ninth Circuit did not completely write substantive due process out of the Constitution, but rather reasoned that this protection will not be expanded to cover conduct covered elsewhere in the Constitution. 75 F.3d. at 1325. The Stearns do not call for *expanding* substantive due process. Rather, the United States Supreme Court has already held that penalized access to courts violates due process. *Wolff v. McDonnell,* 418 U.S. 539 (1974); *Missouri Pacific Railway v. Tucker*, 230 U.S. 340, 349 (1913).

In regard to the Stearns' procedural due process claims, the City claims that three hearings were provided to the Stearns prior to taking an appeal. City's Response at 7. The first two hearings are with the City itself—its hearing examiner and the city council. *Id.* Both are not formal hearings and even the third "hearing" before the Superior Court is admitted by the City to be based exclusively on the

administrative record. City's Response at 11.[3]

However, the City misses the point. The procedural due process violation is in having a hearing available to the Stearns and other land use litigants in the Court of Appeals, but subject to the threat of having to pay the City's attorneys' fees for filing a nonfrivolous, but unsuccessful appeal. *See* cases cited in Petition at 14-18.

IV
THE CITY ADMITS THE PURPOSE OF WASH. REV. CODE § 4.84.370 IS TO DISCOURAGE APPEALS

In an attempt to justify the purposes of the statute, the City recognizes that its purpose is to deter those who challenge government decision-making from filing an appeal.

> Without WASH. REV. CODE § 4.84.370, there is little to discourage land use litigants from abusing the appellate process, and seeking duplicative judicial review of the same land use decision. WASH. REV. CODE § 4.84.370 attempts to stem such abuse by striking a balance between protecting legitimate claims and discouraging meritless ones.

City's Response at 12.

The City's reasoning captures the precise harm of the statute. The government believes that any appeal is abusive and wants to punish meritless, *i.e.*, unsuccessful, appeals. Of

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[3] The City states that, "[u]nder LUPA, the superior court reviews the decision de novo, that is, the court looks to the administrative record to determine whether the land use decision is supported by substantial evidence." City's Response at 11. The City's use of the term "de novo" is nonsensical.

course, if the government loses in the trial court, it wants (and gets under this statute) the right to appeal without the same penalty for filing a losing appeal.[4]

V
THE CITY IS A PROPER DEFENDANT IN THE SECTION 1983 CLAIM

In regard to the Stearns' request for declaratory relief under Section 1983, the City argues that Stearns has not explained "how the City can be the target of a Section 1983 action for bringing a motion under the authority of a constitutional statute." City's Response at 17. Of course, if the statute is constitutional and the City's seeking to enforce it was constitutional, there is no Section 1983 claim. However, if the statute is unconstitutional as the Stearns allege, the City is a proper defendant.

This Court made clear in *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 736-37 (1980) that those who seek to enforce unconstitutional statutes are proper targets for claims for equitable relief under Section 1983. Hence, the City is a proper defendant in a claim under Section 1983 to declare the statute unconstitutional because the City is enforcing the statute by seeking fees.

CONCLUSION

The issues presented are concretely defined because the Stearns have already been assessed the City's attorneys' fees for filing a non-frivolous, but unsuccessful, appeal in

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[4] The City also argues that WASH. REV. CODE § 4.84.370 does not violate the separation of powers doctrine. City's Response at 13. The Stearns did not raise that doctrine in their Issues Presented for Review or in the body of their Petition.

review of the City's regulatory decisions. Such penalties are contrary to this Court's consistent and jealous guarding of equality for citizens who seek redress from government.

> Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.

Romer v. Evans, 517 U.S. 620, 633 (1996). Washington's punishment for unsuccessful appellants is in direct conflict with the Constitutional traditions of this Court.

The Stearns urge the Court to grant their Petition and confirm the right of citizens to enter courts on equal terms when petitioning for redress and review of government decision-making.

DATED: January 18, 2000

Respectfully submitted,

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Supreme Court, U.S.
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No. 99-932

In The

Supreme Court of the United States

GIG HARBOR MARINA, INC., a Texas corporation, d/b/a ARABELLA'S LANDING, and STANLEY STEARNS and JUDY STEARNS, husband and wife,

Petitioners,

v.

THE CITY OF GIG HARBOR, a Washington municipal corporation,

Respondent.

STANLEY and JUDY STEARNS, husband and wife, and GIG HARBOR MARINA, INC., a Texas Corporation, d/b/a ARABELLA'S LANDING MARINA,

Petitioners,

v.

THE CITY OF GIG HARBOR, a Washington municipal corporation,

Respondent.

On Petition For Writ Of Certiorari To The Washington Supreme Court

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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4990

QUESTIONS PRESENTED FOR REVIEW

1. Has petitioner Stearns demonstrated that the state statute at issue in this case (RCW 4.84.370) "penalizes" him, or violates the First or Fourteenth Amendment to the U.S. Constitution, if: (a) there is no fundamental right to an appeal; (b) Stearns has had three hearings on the merits of each case and lost in each hearing; (c) the statute is rationally related to a legitimate governmental purpose of discouraging duplicative and meritless appeals; and (d) the statute does not threaten the integrity or independence of the judiciary?

2. Has petitioner Stearns demonstrated that RCW 4.84.370 conflicts with 42 U.S.C. § 1983 and § 1988, if (a) the statute does not require Stearns to join any potential 42 U.S.C. § 1983 and § 1988 claims with a petition to review a governmental land use decision; or if (b) the statute only authorizes an award of fees on appeal of a governmental "land use approval or decision," for the land use portion of the decision?

3. Has petitioner Stearns shown a violation of his constitutional rights by the City's mere filing of a motion (which was later withdrawn) informing Stearns of the existence of a statute that would allow the City to recover its attorneys' fees, and placing Stearns on notice of the City's intent to seek its attorneys' fees under a valid statute?

PARTIES TO THE PROCEEDING

The petitioners are Gig Harbor Marina, Inc., Stanley Stearns and Judy Stearns. For some unexplained reason, petitioners have included another lawsuit in this appeal, involving another party, Arabella's Landing Marina.

The respondent is the City of Gig Harbor, a Washington municipal corporation.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

PARTIES TO THE PROCEEDING ii

OPINION BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE 2

COUNTERSTATEMENT OF THE CASE 2

ARGUMENT 4

THE WASHINGTON COURTS DID NOT ERR IN RULING THAT RCW 4.84.370 IS CONSTITUTIONAL 4

1. Stearns bears the burden of proving that RCW 4.84.370 is unconstitutional beyond a reasonable doubt 4

2. RCW 4.84.370 does not violate due process because Stearns does not have a fundamental right to appeal, and he has taken advantage of three opportunities to litigate the merits of his case 5

   a. Stearns' challenge to RCW 4.84.370 cannot proceed as a substantive due process claim because the statute does not infringe upon a fundamental right, and because there are other more specific Constitutional provisions under which Stearns can seek relief 5

   b. Stearns cannot establish a procedural due process claim because he has already had three hearings on the merits 6

TABLE OF CONTENTS – Continued

Page

3. RCW 4.84.370 has not violated Stearns' First Amendment right to petition the government for redress of grievances because it has not obstructed his access to the courts 8

4. RCW 4.84.370 does not violate equal protection because it does not infringe upon a fundamental right, and because it is rationally related to a legitimate governmental purpose 9

5. RCW 4.84.370 does not violate the separation of powers doctrine because it is a legitimate exercise of legislative power 13

6. Neither 42 U.S.C. § 1983 nor 42 U.S.C. § 1988 preempts RCW 4.84.370 because there is no conflict between federal civil rights legislation and state land use laws 14

STEARNS HAS NOT SHOWN THAT THE WASHINGTON COURT'S DENIAL OF HIS CLAIM FOR DECLARATORY RELIEF UNDER 42 U.S.C. § 1983 SATISFIES THE CRITERIA FOR GRANTING A WRIT OF CERTIORARI 15

CONCLUSION 18

APPENDIX

Full Opinion of the Washington Court of Appeals in No. 22906-4-II, Division II, Gig Harbor Marina, Inc., d/b/a Arabella's Landing, and Stanley Stearns and Judy Stearns v. City of Gig Harbor ..... App. 1

TABLE OF AUTHORITIES

Page

CASES

Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996) ...5, 6

Campos v. Department of Labor & Indus., 75 Wn. App. 379, 880 P.2d 543 (1994), *review denied*, 126 Wn.2d 1004 (1995) 4

Filan v. Martin, 38 Wn. App. 91, 684 P.2d 769 (1984) 8

First Federal Savings & Loan Ass'n v. West Richland, 39 Wn. App. 401, 693 P.2d 171 (1985) 13

Ford Motor Co. v. Barrett, 115 Wn.2d 556, 800 P.2d 367 (1990) 4, 6, 7, 12

Halverson v. Skagit County, 42 F.3d 1257 (9th Cir. 1994) 16

Haygood v. Younger, 769 F.2d 1350 (9th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986) 7

In re Primus, 436 U.S. 412, 98 S. Ct. 1893, 56 L. Ed. 2d 417 (1978) 8

Kalmas v. Wagner, 133 Wn.2d 210, 943 P.2d 1369 (1997) 14, 16

King County v. Boundary Review Board, 122 Wn.2d 648, 860 P.2d 1024 (1993) 12

Logan v. Zimmerman Brush Co., 455 U.S. 422, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982) 7

Longview Fibre Co. v. DOE, 89 Wn.App. 627, 949 P.2d 851 (1998) 4

Ortwein v. Schwab, 410 U.S. 656, 93 S. Ct. 1172, 35 L. Ed. 2d 572 (1973) 6, 7

TABLE OF AUTHORITIES – Continued

Page

Patel v. Penman, 103 F.3d 868 (9th Cir. 1996), *cert. denied*, 520 U.S. 1240, 117 S. Ct. 1845, 137 L. Ed. 2d 1048 (1997) 5

Seattle v. Fontanilla, 128 Wn.2d 492, 909 P.2d 1294 (1996) 11

Seattle School Dist. No. 1 v. Department of Labor & Indus., 116 Wn.2d 352, 804 P.2d 621 (1991) 11

Seeley v. State, 132 Wn.2d 776, 940 P.2d 604 (1997) 10

Soundgarden v. Eikenberry, 123 Wn.2d 750, 871 P.2d 1050, *cert. denied*, 513 U.S. 1056 (1994) 7

Stevedoring Servs. of Am. v. Eggert, 129 Wn.2d 17, 914 P.2d 737 (1996) 15

Suburban Fuel Co. v. Lamoreaux, 4 Wn. App. 179, 480 P.2d 216 (1971) 14

Thurston County Rental Owners Ass'n v. Thurston County, 85 Wn. App. 171, 931 P.2d 208, *review denied*, 132 Wn.2d 1010 (1997) 11

United States v. Harriss, 347 U.S. 612, 74 S. Ct. 808, 98 L. Ed. 989 (1954) 8, 9

United States v. Kras, 409 U.S. 434, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1973) 6

Vacco v. Quill, 521 U.S. 793, 117 S. Ct. 2293, 138 L. Ed. 2d 834 (1997) 10, 11

Washington v. Glucksberg, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772 (1997) 6

CONSTITUTIONAL PROVISIONS

Washington Constitution, Article 4, § 1 13

TABLE OF AUTHORITIES – Continued

Page

STATUTES

42 U.S.C. § 1983 ..... *passim*

42 U.S.C. § 1988 ..... *passim*

RCW 4.84.370 ..... *passim*

RCW 36.70C 3

RCW 36.70C.130(1) 11

OPINION BELOW

Stearns appeals from the decision of the Washington Supreme Court in *Gig Harbor Marina, Inc. v City of Gig Harbor,* denying the petition for review. The opinion of the Washington Court of Appeals was not issued on April 21, 1997, as stated by Stearns. Only the published portion of the opinion was provided by Stearns to this Court in their Appendix A. The City has attached a full copy of the Court of Appeals' decision (Div. II, No. 22906-4-II, dated March 26, 1999) as Appendix A. The City believes that this full copy should be reviewed by this Court, as this unpublished version also contains the Washington Court's decision dismissing the third question Stearns has presented for review.

The case attached as Appendix A is only one of Stearns' five pending lawsuits against the City. Stearns has attached a copy of the Court of Appeals' decision in one of these unrelated cases as Appendix C to his Petition for Writ of Certiorari. It has absolutely no relevance to this case, other than the fact that it demonstrates that Stearns does not find the existence of RCW 4.84.370 to "chill" decision to file an appeal of land use decisions after he has lost at every level of appeal.

JURISDICTION

Stearns appeals the constitutionality of RCW 4.84.370 and requests declaratory relief under 42 U.S.C. § 1983.

CONSTITUTIONAL AND STATUTORY PROVISIONS AT ISSUE

Stearns believes that RCW 4.84.370 is unconstitutional under the First Amendment to the U.S. Constitution, Section 1 of the Fourteenth Amendment of the U.S. Constitution and Section 1983 of the United States Code.

COUNTERSTATEMENT OF THE CASE

One of the development schemes proposed by Stearns for his property involved an application for a site plan and conditional use permit for an office-retail building, a yacht club and an open plaza. The City hearing examiner denied the site plan application because of inadequate on-site parking, but granted the conditional use permit on condition that Stearns provide additional on-site parking. The City Council affirmed the denial of the site plan and reversed the hearing examiner's decision on the conditional use permit, finding that such a permit could not be granted if the site had inadequate parking.

Stearns has made an erroneous statement of the facts on page 3 of his Petition. He claims that "during the review of the Stearns' applications, the City changed its interpretation of the zoning code's parking requirements for the Stearns' proposal." Even if this were true, the City's interpretation is the City's final decision, not a statement made by any City staff member during the application review process.

Stearns appealed the City Council's denial of his applications under the Land Use Petition Act, chapter

36.70C RCW. The Pierce County Superior Court dismissed Stearns' land use petition and all claims against the City with prejudice. The City thereafter filed a motion for calculation of the amount of attorneys' fees and costs to which it would be entitled under RCW 4.84.370. Stearns' objected to the motion claiming it was premature, and that RCW 4.84.370 was unconstitutional. The City withdrew its motion upon Stearns' objection. The Court thereafter allowed Stearns to amend his dismissed petition to add two causes of action for declaratory relief on the constitutionality of RCW 4.84.370, and for an award of attorneys' fees and costs against the City under 42 U.S.C. § 1988 for an alleged violation of civil rights.

The Superior Court denied Stearns' summary judgment motion for declaratory relief, and granted the City's motion to dismiss Stearns' Section 1983 claim, finding that the Section 1983 claim was frivolous and awarding the City its attorney's fees.

Stearns appealed to the Washington Court of Appeals, and on March 26, 1999, the Court issued its decision finding that the City correctly denied the development permits, that RCW 4.84.370 was constitutional, and dismissing Stearns' 42 U.S.C. § 1983 claims.

Declarations of Stanley Stearns and Richard Lindberg.

Stearns makes much of the "chilling effect" of RCW 4.84.370. He submits a declaration to this Court explaining that as a result of the statute, he was discouraged from filing an appeal. However, the facts are completely opposite – after the City Council denied his development applications, he appealed to Pierce County Superior

Court, the Washington Court of Appeals and the Washington Supreme Court. In the unrelated case he has attached as Appendix C to his Petition for Writ of Certiorari, Stearns further demonstrates that he is willing to appeal adverse land use decisions, even when he loses on every level of appeal.

ARGUMENT

THE WASHINGTON COURTS DID NOT ERR IN RULING THAT RCW 4.84.370 IS CONSTITUTIONAL.

1. Stearns bears the burden of proving that RCW 4.84.370 is unconstitutional beyond a reasonable doubt.

Stearns bears the burden of proving that RCW 4.84.370 is unconstitutional beyond a reasonable doubt. *Ford Motor Co. v. Barrett*, 115 Wn.2d 556, 563, 800 P.2d 367 (1990); *Campos v. Department of Labor & Indus.*, 75 Wn. App. 379, 384, 880 P.2d 543 (1994), *review denied*, 126 Wn.2d 1004 (1995). A statute must be given a construction which preserves its constitutionality if at all possible. *Longview Fibre Co. v. DOE*, 89 Wn.App. 627, 632, 949 P.2d 851 (1998).

2. RCW 4.84.370 does not violate due process because Stearns does not have a fundamental right to appeal, and he has taken advantage of three opportunities to litigate the merits of his case.

Stearns contends that RCW 4.84.370 violates due process. He does not, however, differentiate between procedural and substantive due process, or set out the threshold requirements for either type of claim.

a. Stearns' challenge to RCW 4.84.370 cannot proceed as a substantive due process claim because the statute does not infringe upon a fundamental right, and because there are other more specific Constitutional provisions under which Stearns can seek relief.

Stearns argues that RCW 4.84.370 has no apparent legitimate purpose. If this argument is designed to trigger a substantive due process analysis, it must fail. Recent case law establishes a new test for analyzing substantive due process claims. *Patel v. Penman*, 103 F.3d 868, 874-75 (9th Cir. 1996), *cert. denied*, 520 U.S. 1240, 117 S. Ct. 1845, 137 L. Ed. 2d 1048 (1997); *Armendariz v. Penman*, 75 F.3d 1311, 1318-26 (9th Cir. 1996). Under these cases, substantive due process no longer provides protection against government conduct where such conduct is circumscribed by other more specific provisions of the Constitution. *Armendariz* at 1319. Stearns has asserted that RCW 4.84.370 violates the First Amendment, equal protection and procedural due process. Because these provisions of the Constitution potentially protect Stearns against the alleged harm of RCW 4.84.370, Stearns' claims must be

analyzed under those provisions alone, and not under the more general guarantees of substantive due process. *Armendariz* at 1325-26. Notwithstanding the above, Stearns cannot establish a substantive due process claim. Substantive due process is not implicated unless a fundamental right is involved. *Washington v. Glucksberg*, 521 U.S. 702, 117 S. Ct. 2258, 138 L. Ed. 2d 772, 787 (1997). Fundamental rights include those specific freedoms protected by the Bill of Rights, and those rights indispensable to personal liberty such as the right to marry, to have children, and to bodily integrity. *Id.* at 787.

The "rights" asserted by Stearns do not fall in this same category. He claims RCW 4.84.370 impermissibly infringes upon his appeal rights. "Due process does not, however, guarantee a right to appeal." *Ford Motor Co.*, 115 Wn.2d at 569 (citing *Ortwein v. Schwab*, 410 U.S. 656, 660, 93 S. Ct. 1172, 35 L. Ed. 2d 572 (1973)). Stearns also complains about the financial "burden" of paying the government's attorneys' fees. Economic interests, however, have far less constitutional significance than fundamental rights. *Ortwein*, 410 U.S. at 659; *United States v. Kras*, 409 U.S. 434, 444-46, 93 S. Ct. 631, 34 L. Ed. 2d 626 (1973).

b. Stearns cannot establish a procedural due process claim because he has already had three hearings on the merits.

Stearns suggests that RCW 4.84.370 violates due process because it insulates government land use decisions from judicial review. Stearns' argument is baseless because he has already had his day in court. Due process

requires that deprivation of life, liberty or property be preceded by notice and an opportunity for a hearing appropriate to the nature of the case. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428, 102 S. Ct. 1148, 71 L. Ed. 2d 265 (1982); *Soundgarden v. Eikenberry*, 123 Wn.2d 750, 768, 871 P.2d 1050, *cert. denied*, 513 U.S. 1056 (1994). The degree of protection depends upon the nature of the interest affected. *Haygood v. Younger*, 769 F.2d 1350, 1355 (9th Cir. 1985), *cert. denied*, 478 U.S. 1020 (1986).

Stearns has received the degree of protection he deserves. Stearns has already had three hearings on the merits of his claim; one with the Hearing Examiner, another with the City Council, and a third in Superior Court. Due process does not require that a plaintiff have an appeal where at least one hearing has already been held. *Ortwein*, 410 U.S. at 659-60.

The Washington Courts previously determined that an attorneys' fees statute similar to RCW 4.84.370 did not violate due process. *Ford Motor Co. v. Barrett*, 115 Wn.2d 556, 800 P.2d 367 (1990). In that case, the Court upheld provisions of the Lemon Law Act allowing prevailing consumers, but not prevailing manufacturers, to recover attorneys' fees incurred on appeal. *Id.* at 570. Like Stearns, the manufacturers argued that the attorneys' fee provision "burdened" their right to appeal and their right of access to the courts. *Id.* at 569. The Court rejected these arguments, concluding that the legislature may make rules concerning the type of damages recoverable and the manner in which damages are paid. *Id.* at 570.

3. RCW 4.84.370 has not violated Stearns' First Amendment right to petition the government for redress of grievances because it has not obstructed his access to the courts.

Stearns contends that RCW 4.84.370 violates his First Amendment right to petition the government for redress of grievances. He argues that litigation is a protected form of speech, and that RCW 4.84.370 exacts an unconstitutional penalty on such speech. Stearns presses this point even though he has litigated the merits of his case at the administrative and judicial levels.

The right to petition the government for redress of grievances is a First Amendment right that protects collective activity taken to achieve meaningful access to the courts. *In re Primus*, 436 U.S. 412, 426, 98 S. Ct. 1893, 56 L. Ed. 2d 417 (1978). This right is not absolute. *Filan v. Martin*, 38 Wn. App. 91, 97, 684 P.2d 769 (1984). Stearns' First Amendment claim must fail for the simple reason that he has already had meaningful access to the courts.

There is no merit to Stearns' contention that RCW 4.84.370 "penalizes" his right of access to the courts. The statute has no operative effect until the litigant loses at the administrative, superior court, and appellate levels. RCW 4.84.370. The statute did nothing to stop Stearns from filing his land use petition, pursuing his claims in court, or filing this appeal.

The fact that attorneys' fees have not been imposed against Stearns under RCW 4.84.370 – and may never be imposed – is further justification for dismissing Stearns' First Amendment claims. In *United States v. Harriss*, 347 U.S. 612, 74 S. Ct. 808, 98 L. Ed. 989 (1954), the Supreme

Court refused to consider a First Amendment attack on the constitutionality of a penalty provision within the Federal Regulation of Lobbying Act that prohibited convicted persons from engaging in lobbying activities for three years from the date of conviction. *Id.* at 626-27. The appellees argued that the penalty provision violated their right to petition the government. *Id.* at 627. The Court found it "unnecessary" to pass on this contention: "Unlike [other provisions of the Lobbying Act, the penalty provision] has not yet been applied to the appellees, and it will never be so applied if the appellees are found innocent of the charges against them." *Id.*

4. RCW 4.84.370 does not violate equal protection because it does not infringe upon a fundamental right, and because it is rationally related to a legitimate governmental purpose.

Stearns claims that RCW 4.84.370 violates equal protection because "it imposes a penalty which operates only against non-governmental litigants in land use cases." AB at 16. Stearns misreads the statute. The City has thought of at least one situation, and there may be others, where a litigant can use RCW 4.84.370 against a local government.

Take the example where a county hearing examiner issues a land use permit with three conditions, and the applicant appeals the authority of the hearing examiner to impose the conditions. On appeal, the county council overturns two of the three conditions, but affirms the third. Under these circumstances, the applicant could in good faith argue that it is the "substantially prevailing" party at the local level. Assume that the applicant then

appeals the imposition of the third condition to superior court and wins that appeal. The applicant is then the "prevailing party" at the superior court level. Finally, if the county were then to appeal reversal of the third condition, but lose, the applicant would be the prevailing party in the court of appeals. In this hypothetical, the applicant is the prevailing or substantially prevailing party at each stage of the proceedings, and a court could find that the applicant is entitled to an award of attorneys' fees from the county under RCW 4.84.370.

Even if we assume that RCW 4.84.370 creates the classification suggested by Stearns, the statute does not violate equal protection. The first step in equal protection analysis is to determine the proper standard of review against which to test the challenged legislation. *Seeley v. State*, 132 Wn.2d 776, 791, 940 P.2d 604 (1997). When a statute does not burden a fundamental right or target a suspect class, the reviewing court will uphold the statute so long as it bears a rational relation to some legitimate end. *Vacco v. Quill*, 521 U.S. 793, 117 S. Ct. 2293, 138 L. Ed. 2d 834, 841 (1997).

Rational basis review is the proper standard against which RCW 4.84.370 should be measured. Stearns has not argued, and there is no proof, that he is a member of a suspect class. Stearns has also failed to show that RCW 4.84.370 implicates any fundamental rights. The "right" or "interest" allegedly infringed upon by the statute is Stearns' desire to appeal without the risk of having to pay the City's attorneys' fees. Stearns' economic interests have "far less constitutional significance" than traditional fundamental interests. *Ortwein*, 510 U.S. at 659.

The rational basis test only requires that any classification created by the statute bear a rational relation to a legitimate state interest. *Vacco*, 138 L. Ed. 2d at 841. Stearns bears the burden of proving that the alleged classification created by RCW 4.84.370 lacks any rational basis and is "purely arbitrary." *Seattle v. Fontanilla*, 128 Wn.2d 492, 505, 909 P.2d 1294 (1996); *Seattle School Dist. No. 1 v. Department of Labor & Indus.*, 116 Wn.2d 352, 362, 804 P.2d 621 (1991).

Stearns falls well short of meeting his burden of proof. Stearns identifies "unsuccessful land use appellants" as the class of people singled out by the statute. He contends that this classification is based on an improper purpose to "shield government from having its exercise of power over private land from being reviewed by an appellate court." The legislature has wide discretion in creating classifications, *Seattle School Dist.*, 116 Wn.2d at 362, and a classification must be "purely arbitrary" to overcome the strong presumption of constitutionality, *Thurston County Rental Owners Ass'n v. Thurston County*, 85 Wn. App. 171, 186, 931 P.2d 208, *review denied*, 132 Wn.2d 1010 (1997). "If the court can reasonably conceive any state of facts which will sustain the classification, it will be sustained." *Seattle School Dist.*, 116 Wn.2d at 362-63.

Shifting a degree of risk to land use litigants makes sense when we consider the standards of review applicable to land use decisions. Under LUPA, the superior court reviews the decision de novo, that is, the court looks to the administrative record to determine whether the land use decision is supported by substantial evidence. RCW 36.70C.130(1). Appellate courts also review the land use

decision on the administrative record, not on the record created in superior court. *King County v. Boundary Review Board*, 122 Wn.2d 648, 672, 860 P.2d 1024 (1993). Without RCW 4.84.370, there is little to discourage land use litigants from abusing the appellate process, and seeking duplicative judicial review of the same land use decision. RCW 4.84.370 attempts to stem such abuse by striking a balance between protecting legitimate claims and discouraging meritless ones. It is certainly rational and legitimate for the legislature to enact legislation to discourage meritless appeals and protect the limited resources of local governments and the judicial system.

Equal protection arguments nearly identical to those raised by Stearns have been considered and rejected by this Court. In the recent *Ford Motor Co. v. Barrett* decision, the Court determined that a fee-shifting statute allowing prevailing consumers but not prevailing manufacturers to recover attorneys' fees incurred in appealing a decision of the motor vehicle arbitration board did not violate equal protection. 115 Wn.2d at 567-68. Ford, like Stearns in this case, argued that the attorneys' fee provision violated equal protection by "singling out a class of litigants and subjecting them to onerous penalties as a condition of seeking redress within the court system." *Id.* at 561. Ford also argued that the practical effect of the statute was to allow only consumers to appeal without risk, and that the fee-shifting statute burdened its fundamental right of access to the courts by restricting its right to appeal. *Id.* Finding these claims to be without merit, the Court concluded that Ford did not meet its burden of demonstrating the statute unconstitutional beyond a reasonable doubt. *Id.* at 567-68.

5. RCW 4.84.370 does not violate the separation of powers doctrine because it is a legitimate exercise of legislative power.

Stearns contends that RCW 4.84.370 frustrates the constitutional powers of the state courts delegated by Article 4, § 1 of the Washington Constitution. His argument presupposes that state courts have the exclusive authority to define a person's right to recover attorneys' fees. To the contrary, it is the legislature, not the courts, that possesses this power. "[T]he allowance of attorney fees as part of the costs of an action is dependent upon statutory authority expressly conferring the power to allow them." *First Federal Savings & Loan Ass'n v. West Richland,* 39 Wn. App. 401, 408, 693 P.2d 171 (1985). A judicial invalidation of RCW 4.84.370 is more likely to upset the balance of powers than affirmance of the statute. Any classifications drawn by the statute demonstrate a legislative policy choice which rightfully belongs with the legislature and not this Court.

Stearns completely mischaracterizes RCW 4.84.370 when he states that it shields local government from appellate review. That is far from the truth. The statute does nothing to prevent appellate review. It does not prohibit the filing of an appeal or require a land use litigant to pay an exorbitant fee prior to having its case heard on the merits. Land use litigants with legitimate claims will not be deterred from seeking appellate review. It is only those litigants with meritless claims, who have already lost at the administrative and judicial levels, that face the risk of paying local government's attorneys' fees on appeal.

Stearns' separation of powers claim demonstrates a fundamental misunderstanding of the relationship between the legislature and the judiciary. The legislature has the power to change substantive law, and may create or even abolish causes of action. *Suburban Fuel Co. v. Lamoreaux*, 4 Wn. App. 179, 181, 480 P.2d 216 (1971). Accordingly, the enactment of an attorneys' fees statute is a legitimate exercise of legislative power and does not impair recognized judicial powers.

6. Neither 42 U.S.C. § 1983 nor 42 U.S.C. § 1988 preempts RCW 4.84.370 because there is no conflict between federal civil rights legislation and state land use laws.

Stearns contends that RCW 4.84.370 conflicts with the Civil Rights Act, and is therefore preempted. Stearns plays up this alleged "conflict" by noting that land use claims are often paired with civil rights claims. AB at 22. Stearns' mistakenly assumes that the state and federal statutes apply to the same activity.

The Civil Rights Act and RCW 4.84.370 serve completely different purposes. Section 1983 provides a mechanism for persons to challenge government conduct violative of a federal constitutional or statutory right. 42 U.S.C. § 1983; *see also Kalmas v. Wagner*, 133 Wn.2d 210, 943 P.2d 1369 (1997). 42 U.S.C. § 1988 ("Section 1988") provides for an award of reasonable attorneys' fees and costs to the prevailing party in a Section 1983 action. 42 U.S.C. § 1988. These statutes do not provide a mechanism for persons to obtain judicial review of local government land use decisions.

RCW 4.84.370, on the other hand, applies in land use cases, not civil rights cases. The statute's scope is limited to cases where a land use applicant challenges a local land use decision. RCW 4.84.370. The statute does nothing to impede any rights or procedures created by the Civil Rights Act.

Absent any overlap in the state and federal schemes, there can be no conflict warranting preemption. The test for preemption is as follows:

> Preemption may occur if (1) Congress passes a statute that expressly preempts state law, (2) Congress occupies the entire field of regulations, or (3) state law conflicts with federal law, making compliance with both an impossibility or state law presents an obstacle to the accomplishment of the federal purpose.

Stevedoring Servs. of Am. v. Eggert, 129 Wn.2d 17, 23, 914 P.2d 737 (1996). Stearns has not alleged that the Civil Rights Act expressly preempts state land use regulations, or that Congress has occupied the entire field of land use law. Stearns' only argument is that RCW 4.84.370 "conflicts" with the "remedial objectives" of the Civil Rights Act. AB at 23-24.

Stearns has clearly failed to show that it is "physically impossible" to comply with both RCW 4.84.370 and the Civil Rights Act. The state and federal statutes cover completely different subjects. One is designed to protect against unconstitutional governmental conduct, wherever it occurs, and the other only applies in land use cases. The fact that land use claims can sometimes be joined with civil rights claims does not prove that the statutes conflict. Section 1983 and Section 1988 do not even come

into play in land use cases where there is no allegation of unconstitutional governmental conduct.

STEARNS HAS NOT SHOWN THAT THE WASHINGTON COURT'S DENIAL OF HIS CLAIM FOR DECLARATORY RELIEF UNDER 42 U.S.C. § 1983 SATISFIES THE CRITERIA FOR GRANTING A WRIT OF CERTIORARI.

Stearns contends that the City's filing of its Motion for Calculation of Attorneys' Fees Under RCW 4.84.370 violated his constitutional rights, entitling him to attorneys' fees and costs under Section 1988. There is absolutely no merit to this argument. The City never sought an actual award of attorneys' fees under the statute, and immediately withdrew the motion when Stearns objected. The filing of the motion was no more harmful to Stearns than if the City had filed an answer requesting its attorneys' fees and costs under the statute. Viewing the evidence in the light most favorable to Stearns, the Superior Court nonetheless found the Section 1983 claim to be frivolous.

In order to establish a cause of action under Section 1983, Stearns must show (1) that the City violated a federal constitutional or statutory right, and (2) that the City was acting under color of state law. *Kalmas*, 133 Wn.2d at 215. To obtain an award of attorneys' fees against the City, Stearns must also show that his alleged constitutional injury was proximately caused by an act or omission of the City. *Halverson v. Skagit County*, 42 F.3d 1257, 1260 (9th Cir. 1994).

When measured against these threshold requirements, it is obvious that Stearns has not met his burden of proof. Stearns has not proven that RCW 4.84.370 violates any of his constitutional rights. *See* discussion *infra* part II.B. He has also failed to explain how the City can be the target of a Section 1983 action for bringing a motion under the authority of a constitutional statute.

Stearns claims that the City Attorney "chilled" his right to appeal by putting him on notice that she would be requesting reimbursement of the City's attorneys' fees under RCW 4.84.370. Stearns attempts to provide proof of such "chilling" effect in the form of a Declaration of Richard Lindberg, and a Declaration of Stanley Stearns. Mr. Lindberg is not an attorney for Stearns, and is not a party to this action. His independent experience with RCW 4.84.370 as a representative of a neighborhood association in Kitsap County makes it clear that if there is any "chilling" effect associated with the statute, it is caused by the statute itself, not by any action of the City Attorney. Similarly, if Stanley Stearns' declaration proves anything, it is that the existence of RCW 4.84.370, not any actions of the City Attorney, have forced him to think twice before appealing. The source of Stearns' "chill" is obviously RCW 4.84.370, not the City Attorney's act of putting him on notice of the statute.

It is incomprehensible how the City can be subject to a Section 1983 action under these facts. Notifying Stearns that the City would seek reimbursement of its attorneys' fees under a valid statute was no different than if the City had filed an answer requesting the same relief. In addition, the City never sought – and may never obtain – an award of attorneys' fees under the statute. Any injury to

Stearns is the result of RCW 4.84.370, not the acts or omissions of the City Attorney.

CONCLUSION

For the foregoing reasons, the City respectfully requests that the Court deny Stearns' petition for a writ of certiorari.

DATED this 3rd day of January, 2000.

Respectfully submitted,

LAW OFFICE OF CAROL A. MORRIS, P.C.
CAROL A. MORRIS, WSBA #19241
Attorney for Respondent

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

GIG HARBOR MARINA, INC., a Texas corporation, d/b/a ARABELLA'S LANDING, and STANLEY STEARNS and JUDY STEARNS, husband and wife, Appellants, v. CITY OF GIG HARBOR, a municipal corporation, Respondent.	No. 22906-4-II. PUBLISHED OPINION (Filed March 26, 1999)

ARMSTRONG, J. – The City of Gig Harbor denied the Stearnses' proposed development of property. The Stearnses appealed to the superior court and joined a 42 U.S.C. § 1983 claim alleging the City violated their civil rights. The superior court affirmed the City's denial of the development, dismissed the § 1983 action and, finding the § 1983 action frivolous, awarded attorney's fees to the City. The Stearnses filed this appeal and the City now seeks attorney's fees under RCW 4.84.370, which allows attorney's fees in land use cases to petitioners who have substantially prevailed in front of the local government, the trial court, and the appellate court. The Stearnses contend that RCW 4.84.370 violates equal protection, due process, free speech, and the right to redress grievances. The Stearnses also challenge the dismissal of their 42

U.S.C. § 1983 claim and the trial court's finding that such claim was frivolous. Finally, the Stearnses contend that Gig Harbor misapplied its own ordinances concerning parking space requirements, permitted usage, and height requirements. We hold the statute constitutional as applied here. But we reverse the award of attorney's fees based upon bringing a frivolous action. Otherwise, we affirm the trial court.

FACTS

Stanley and Judy Stearns own four and one-half lots in the City of Gig Harbor on which they operate a marina, Gig Harbor Marina, Inc., known as Arabella's Landing. These lots, zoned "Waterfront Millville," are currently developed with a marina service building, a duplex, and a single-family residence.

The Stearnses proposed to develop the site further with an office-retail building, a yacht club, and an open plaza. The Stearnses applied for site plan approval and for a conditional-use permit, which was required to develop the yacht club. The hearing examiner denied site plan approval because of inadequate on-site parking, but granted a conditional-use permit on condition the Stearnses provide additional parking. The Stearnses contested the City's method of calculating the parking, arguing that the City was misinterpreting its code. Under the Stearnses' interpretation of the code, the site had adequate parking.

The Gig Harbor City Council affirmed the site plan denial because of the parking inadequacy. In addition, the council found "the site plan is not consistent with the

City's comprehensive plan," the proposed use was not "medium usage," and the proposed building did not comply with height restrictions in the Waterfront Millville zone. The city council reversed the grant of the conditional-use permit, finding that such a permit could not be granted if the site had inadequate parking.

The Stearnses filed a Land Use Petition in Pierce County Superior Court under the Land Use Petition Act (LUPA), RCW 36.70C. In July 1996, the trial court affirmed Gig Harbor's land use decisions and dismissed the Stearnses' petition.

Seven days after the petition was dismissed, the City filed a "Motion for Calculation of Attorneys' Fees Under RCW 4.84.370." The City asked the court to "calculate the amount of attorneys' fees that the City would be entitled to under RCW 4.84.370,[1] in the event this action is

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[1] RCW 4.84.370 provides:

Appeal of land use decisions – Fees and costs. (1) Notwithstanding any other provisions of this chapter, reasonable attorneys' fees and costs shall be awarded to the prevailing party or substantially prevailing party on appeal before the court of appeals or the supreme court of a decision by a county, city, or town to issue, condition, or deny a development permit involving a site-specific rezone, zoning, plat, conditional use, variance, shoreline permit, building permit, site plan, or similar land use approval or decision. The court shall award and determine the amount of reasonable attorneys' fees and costs under this section if:

(a) The prevailing party on appeal was the prevailing or substantially prevailing party before the county, city, or town, or in a decision involving a

appealed and the City prevails on appeal." The City further stated that "a ruling at this time would simplify the issues on appeal and clarify the financial risks facing each party." The City accompanied this motion with two affidavits of counsel justifying $11,712 in attorney's fees.

After the Stearnses opposed the motion, the City withdrew it. The Stearnses then moved to amend their petition to add § 1983 claims; they alleged that the City had used the "motion to calculate attorney's fees under RCW 4.84.370" as a threat to deter the Stearnses' appeal of the Land Use Petition. The Stearnses contended that the statute was unconstitutional and that their proposed amendment sought a declaration of the rights and duties of the parties. The trial court allowed the amendment.

The Stearnses moved for summary judgment, and the City countered with a "Motion to Dismiss Damage Claims Under 42 U.S.C. § 1983 and 42 U.S.C. § 1988 With Prejudice." The trial court denied the Stearnses' motion for summary judgment, granted the City's motion to dismiss, and found that the § 1983 claims were frivolous.

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substantial development permit under chapter 90.58 RCW, the prevailing party on appeal was the prevailing party or the substantially prevailing party before the shoreline(s) hearings board; and

(b) The prevailing party on appeal was the prevailing party or substantially prevailing party in all prior judicial proceedings.

(2) In addition to the prevailing party under subsection (1) of this section, the county, city, or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal.

The City subsequently moved for attorney's fees under 42 U.S.C. § 1988, RCW 4.84.185, and CR 11; the trial court awarded $5,773.80 in fees against the Stearnses and their attorneys.

ANALYSIS

The City first contends that the constitutional issues are not ripe because no attorney's fees have been assessed against the Stearnses under RCW 4.84.370. The argument lacks merit. In both actions[2] pending before this court involving the Stearnses and the City, the City has requested attorney's fees on appeal on the basis of RCW 4.84.370. This raises the question of whether the statute is constitutional.

A. Is RCW 4.84.370 Constitutional?

The Stearnses' constitutional challenges to the statute rest upon two propositions: (1) the burden created by the statute is not carried equally by all litigants in land use cases, but only by those who challenge a local government's land use decision; and (2) while not absolutely denying the right to appeal, the statute chills the exercise of such right.

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[2] The other action filed in this court is *Stearns v. City of Gig Harbor*, No. 22912-9-II (March 26, 1999).

1. Equal Protection

a. *Standard of Review*

The legislative classification here defines a party's liability for the attorney's fees and costs of the opposing party on appeal of a local land use decision. A party who prevails or substantially prevails is entitled to fees and costs, and the statute defines the concept of "prevailing party." Assuming the statute creates a classification that treats members of the same class differently, such classification "neither involves suspect criteria (race, religion, national origin, alienage, gender) nor affects fundamental interests ([e.g.], free speech, privacy, voting rights), [and] the court will engage in only minimum scrutiny of the enactments[.]" *American Network, Inc. v. Utilities and Transp. Comm'n*, 113 Wn.2d 59, 77-78, 776 P.2d 950 (1989) (citation omitted) (footnote omitted). Statutes that regulate business and economic activities "carry a strong presumption of constitutionality." *American Network*, 113 Wn.2d at 78, 776 P.2d 950. And we will uphold such statutes if the classification created bears any rational relation to a legitimate state interest. *Seeley v. State*, 132 Wn.2d 776, 795, 940 P.2d 604 (1997). Stated slightly differently, such a classification will be upheld " 'unless it rests on grounds wholly irrelevant to the achievement of legitimate state objectives.' " *State v. Coria*, 120 Wn.2d 156, 171. 839 P.2d 890 (1992) (quoting *Omega Nat'l Ins. Co. v. Marquardt*, 115 Wn.2d 416, 431, 799 P.2d 235 (1990)).

b. *Burden of Proof*

The party challenging the constitutionality of a statute bears the burden of proving it is unconstitutional beyond a reasonable doubt. *Ford Motor Co. v. Barrett*, 115 Wn.2d 556, 563, 800 P.2d 367 (1990). The Stearnses thus bear the burden of proving all the elements of an equal protection violation. Initially, the Stearnses must show that the statute fails to afford like treatment to "persons similarly situated with respect to a legitimate purpose of the law. . . . " *Coria*, 120 Wn.2d at 169 (citing *State v. Schaaf*, 109 Wn.2d 1, 17, 743 P.2d 240 (1987)). Next, if the Stearnses can show such disparate treatment, they must demonstrate that the difference lacks any rational basis and is " 'purely arbitrary.' " *Coria*, 120 Wn.2d at 172 (quoting *Omega Nat'l Ins.*, 115 Wn.2d at 431).

c. *Does the Statute Benefit Only One Class of Litigants, i.e., Local Government?*

The statute is neutral on its face, i.e., it does not say that only local governments can recover fees on appeal. But not all facially neutral statutes are neutral in their application; some legislation denies equal protection by the manner in which it is applied. *See* 2 RONALD D. ROTUNDA, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 18.4, at 344 (1986). Examples of "as-applied" challenges are *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977) (challenge to a facially neutral zoning decision), and *Washington v. Davis*, 426 U.S. 229, 96 S. Ct. 2040, 48 L.Ed.2d 597 (1976) (challenge to facially neutral police screening exam).

Stearnses contend that not all parties who appeal land use decisions are afforded like treatment under the statute. The Stearnses argue that because the government is both decision-maker and party at the local level, it will never appeal its own land use decision, and so, the government will never be the losing party at the first level. Thus, the Stearnses conclude, the government will never be assessed fees and costs under the statute because it will never lose at all levels.

But the Stearnses' argument rests upon an assumption not demonstrated by this record: that even assuming the City will never appeal its own decision, it is necessarily the prevailing or substantially prevailing party at the local level. The City poses an illustrative hypothetical. Suppose a city hearings examiner approves a proposed development, attaching three or more conditions. The developer appeals to the city council, which strikes all but one of the conditions; unless the stricken conditions were minor, the developer would have substantially prevailed in proceedings before the City. Then suppose the developer appeals the remaining condition to superior court, which strikes it; the developer would be the prevailing party in that judicial proceeding as well. Finally, suppose the City appeals the superior court's decision to the Court of Appeals, which affirms the trial court. The developer would be the substantially prevailing or prevailing party before the appellate court, the trial court, and the City and thus, the developer, not the City, would be entitled to attorney's fees and costs under the statute.

This construction is supported by paragraph (2) of the statute, which provides: "In addition to the prevailing party under subsection (1) of this section, the county, city,

or town whose decision is on appeal is considered a prevailing party if its decision is upheld at superior court and on appeal." RCW 4.84.370(2).

Under the hypothetical, a developer who improved his or her position from the hearing examiner to the city council, but then failed to improve through the superior court and appellate court could argue under subsection (1) that the City is not entitled to fees because the developer prevailed at the city level. But subsection (2) makes clear that under these circumstances, the City is entitled to fees. A necessary corollary is that a developer who improves its position from the hearing examiner to the city council can in some situations be considered to have prevailed or substantially prevailed. If the City were always the prevailing party at the council level, subsection (2) would not be necessary.

We conclude that the Stearnses have failed to carry their burden of showing that the statute, as applied, discriminates against land use applicants. Therefore, we need not engage in further equal protection analysis.

2. Due Process/ First Amendment Right to Petition

The First Amendment includes the right to petition the government for redress of grievances. The Stearnses argue correctly that this right includes meaningful access to the courts. *In re Primus*, 436 U.S. 412, 426, 98 S. Ct. 1893, 56 L.Ed.2d 417 (1978); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S. Ct. 609, 30 L.Ed.2d 642 (1972). Then the Stearnses argue that, because RCW 4.84.370 permits an award of attorney's fees to the government as prevailing party in a land use

case but not to an applicant, the statute denies due process of law to applicants and impermissibly "chills" their First Amendment rights. As discussed above, this argument assumes a false premise – that an applicant can never qualify for attorney's fees as a prevailing party.

In any event, the statute does not keep an applicant from obtaining meaningful judicial review of a land use decision. The Stearnses went to superior court to challenge the City's denial of their development permit. And not all superior court decisions entitle the losing party to higher judicial review. For instance, the Rules of Appellate Procedure allow only discretionary review of superior court decisions in cases originating in the courts of limited jurisdiction. RAP 2.3(d). *See City of Seattle v. Hesler*, 98 Wn.2d 73, 653 P.2d 631 (1982). Likewise, in most cases, review by the Supreme Court is only at that court's discretion. RAP 4.2.

Other statutes and court rules also permit an award of attorney's fees and costs against a party who pursues an appeal beyond a certain level. *See, e.g.*, MAR 7.3 (party who appeals arbitration award and fails to improve position is liable for reasonable attorney's fees); RAP 18.9(a) (sanctions for frivolous appeal); RCW 10.73.160 (appellate costs, including fee for court-appointed counsel, assessed against adult or juvenile criminal who does not prevail on appeal).

And due process does not guarantee the right to appeal. *Ford Motor*, 115 Wn.2d at 562. Rather, the State may impose a risk of attorney's fees beyond a certain level in the judicial process where "the balance of state and private interests favors the government scheme."

Ford Motor, 115 Wn.2d at 569 (citation omitted). Here, the Legislature has determined that to discourage meritless appeals, a party appealing a land use decision beyond the superior court risks paying an opponent's fees. Given the strong presumption of constitutionality where a statute regulating economic matters is challenged on equal protection or due process grounds, we hold that the balance here favors the government scheme. RCW 4.84.370 does not unconstitutionally deny access to the courts.

3. Separation of Powers

The gist of this argument is that by enacting this attorney's fee statute, the Legislature has burdened and frustrated the judiciary's power of judicial review because only those who can afford the other side's attorney's fees will appeal local land use decisions. This ignores the longstanding rule in this state that a party can recover attorney's fees only when authorized by *statute*, contract, or recognized ground in equity. And the Legislature has enacted many statutes that authorize the recovery of attorney's fees. This is a common legislative function, not the province of the courts.

Moreover, the Stearnses have not demonstrated how the statute affects the powers of the court. While the statute may "chill" some cases in which the courts might overturn the actions of local government, the Stearnses have not cited a single case as to how this interferes with the powers of the judiciary. In those cases that reach the court, the court's powers are unchanged.

B. Conflict with 42 U.S.C. § 1983 and 42 U.S.C. § 1988

The Stearnses contend that RCW 4.84.370 conflicts with, and is thus preempted by, 42 U.S.C. § 1983 and § 1988. These latter statutes provide a cause of action for the violation of federal constitutional and statutory rights, and for attorney's fees to the prevailing party. Because civil rights claims often accompany, or are part of, land use petitions, the Stearnses contend that the statutes conflict.

"Preemption may occur if (1) Congress passes a statute that expressly preempts state law, (2) Congress occupies the entire field of regulations, or (3) state law conflicts with federal law, making compliance with both an impossibility or state law presents an obstacle to the accomplishment of a federal purpose." *Stevedoring Servs. of Am. v. Eggert*, 129 Wn.2d 17, 23, 914 P.2d 737 (1996) (citation omitted). The Stearnses have not claimed that § 1983 or § 1988 expressly preempts RCW 4.84.370, or that Congress occupied the entire field of land use law. Rather, the Stearnses' claim that RCW 4.84.370 presents an obstacle to the accomplishment of a federal purpose.[3]

The Stearnses cite *Felder v. Casey*, 487 U.S. 131, 108 S. Ct. 2302, 101 L. Ed. 2d 123, (1988), in which the United States Supreme Court invalidated a statute requiring litigants to file a claim against a local government before

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[3] Section 1983 and § 1988 will never apply in the same case as RCW 4.84.370 because by definition the government would have to lose litigation to be susceptible to attorney's fees under § 1988, while the government must win litigation to receive attorney's fees under RCW 4.84.370.

litigating any claim against the government, including § 1983 claims. Litigants who did not file such a claim in the proscribed time period were barred from filing suit. *Felder* is distinguishable. There, the statute barred the claim. Here, the statute does not bar an appeal past the superior court; it only imposes fees on an appellant who is unsuccessful for the third time.

The Stearnses contend that the "chilling effect" of RCW 4.84.370 will deter people from bringing the takings claims[4] that accompany land use petitions. This potential "chilling effect" was of concern to the United States Supreme Court when it limited the attorney's fees defendants could recover under § 1983 and § 1988 to those suits where the plaintiff's claims were "frivolous, unreasonable, or without foundation." *Hughes v. Rowe*, 449 U.S. 5, 14, 101 S. Ct. 173, 66 L. Ed. 2d 163 (1980) (citing *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978)).

The Court held that:

> "To take the further step of assessing attorneys fees against plaintiffs simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII."

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[4] A takings claim is a claim that the government has taken private property for public use without paying just compensation. U.S. CONST., amend. V.

Hughes, 449 U.S. at 14-15 (quoting *Christiansburg Garment*, 434 U.S. at 422).[5]

But a land use applicant is not required to join any potential § 1983 and § 1988 claims with a petition to review a governmental land use decision. Such claims may be brought in a separate action not subject to the fees provision of RCW 4.84.370. Further, even if the claims are joined, RCW 4.84.370 authorizes an award of fees on appeal only of a governmental "land use approval or decision." Thus, where a land use petition is joined with § 1983 or § 1988 claims, attorney's fees can be awarded under RCW 4.84.370 only for the land use portion of the action.

In conclusion, the Stearnses have failed to show that RCW 4.84.370 is unconstitutional as applied. The City is entitled to reasonable attorney's fees incurred after the appeal from the superior court.[6]

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

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[5] While *Christiansburg* dealt with Title VII of the Civil Rights Act of 1964, the case citing it, *Hughes v. Rowe*, adopted the same standard for § 1983 and § 1988, expressing identical concerns. *Hughes v. Rowe*, 449 U.S. 5, 14-15, 101 S. Ct. 173, 66 L. Ed. 2d 163 (1980).

[6] We have recently held that RCW 4.84.370 only provides for an award of attorney's fees incurred before the Court of Appeals or the Supreme Court. *Baker v. Tri Mountain*, No. 20905-5-II (filed March 22, 1999).

C. The § 1983 Claims

On the City's motion, the trial court dismissed the Stearnses' claim for declaratory relief under § 1983. The court also found the action frivolous and awarded attorney's fees to the City under 42 U.S.C. § 1988, RCW 4.84.185, and CR 11.

To establish a claim under § 1983, the Stearnses had to show that the city (1) "violated a federal constitutional or statutory right," and (2) in doing so, the City was "act[ing] under color of state law." *Kalmas v. Wagner,* 133 Wn.2d 210, 215, 943 P.2d 1369 (1997) (citing *Parratt v. Taylor,* 451 U.S. 527, 535, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981), *overruled on other grounds by Daniels v. Williams,* 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986); *Sintra, Inc. v. City of Seattle,* 119 Wn.2d 1, 11, 82 P.2d 765 (1992)). As we have discussed, RCW 4.84.370 is constitutional. It follows that the Stearnses' § 1983 claim fails to the extent that it was based upon the City's use of an unconstitutional statute. But the Stearnses also argue their § 1983 claim can be supported by the city's use of a constitutional statute in an improper manner, citing *Greenwich Citizens Comm., Inc. v. Counties of Warren and Wash. Indus. Dev. Agency,* 77 F.3d 26 (2nd Cir. 1996)

But we need not address the arguments because the Stearnses have, with this opinion, received the relief they sought. The Stearnses' § 1983 claim asked for a declaration that RCW 4.84.370 was unconstitutional and a declaration of their rights under the statute. The Stearnses did not ask for damages. We have held the statute constitutional. And the Stearnses' rights and duties under the statute, within the context of this case, flow from our

decision and the terms of the statute. In short, whether the trial court erred in dismissing the action is of no consequence. We have granted the Stearnses the relief they sought.

D. Attorney's Fees for Frivolous Claim

Whether a particular claim is frivolous lies within the discretion of the trial court. But if the lawsuit is not frivolous as a whole, attorney's fees cannot be awarded under RCW 4.84.185. *Biggs v. Vail*, 119 Wn.2d 129, 136, 830 P.2d 350 (1992). The substantive claims regarding the constitutionality of RCW 4.84.370 were not found to be frivolous, only the § 1983 claim based upon the City's motion to calculate fees under RCW 4.84.370. Therefore the award of fees under RCW 4.84.185 was unwarranted.

Under CR 11:

> A " 'pleading, motion or legal memorandum' may be subject to CR 11 sanctions if it is both (1) 'baseless' and (2) signed without reasonable inquiry." A filing is "baseless" if (a) not well grounded in fact, or (b) not warranted by (i) existing law or (ii) a good faith argument for the alteration of existing law.

Blair v. GIM Corp., Inc., 88 Wn. App. 475, 482-83, 945 P.2d 1149 (1997) (citations omitted).

Under § 1988, attorney's fees can be awarded against a plaintiff only if his claims are "frivolous, unreasonable, or without foundation." *Hughes*, 449 U.S. at 14 (citing *Christiansburg Garment*, 434 U.S. at 422).

The trial court, apparently viewing the Stearnses' § 1983 action as one for damages, dismissed the § 1983 action because the Stearnses had not shown that (1) the City violated their constitutional rights, (2) the City's motion to calculate attorney's fees was not a proximate cause of injury to the Stearnses, and (3) the City was immune from liability. We agree that the Stearnses failed to show that the City violated a constitutional right, but the remaining two reasons fail because the Stearnses were not seeking damages. Rather, the Stearnses sought a declaration of the rights and duties of the parties under RCW 4.84.370. Whether the City's motion was a proximate cause of damage to the Stearnses was simply not an issue. Similarly, whether the City was immune from a damage claim under § 1983 was not an issue. Thus, the sole reason supporting dismissal of the § 1983 claim was the Stearnses' failure to show a violation of a constitutional right. The trial court did not find this issue to be frivolous and we agree. *Tiger Oil Corp. v. Department of Licensing*, 88 Wn. App. 925, 938, 946 P.2d 1235 (1997) ("A lawsuit is frivolous when it cannot be supported by any rational argument on the law or facts.") Accordingly, the award of attorney's fees against the Stearnses must be reversed.

E. Parking Requirements

Turning to the merits of the underlying land use appeal, the Stearnses contend that the City misapplied its ordinances governing parking. The standard of review of the interpretation of a statute under LUPA is apparently "de novo under the contrary to law standard." *Freeburg v.*

City of Seattle, 71 Wn. App. 367, 371, 859 P.2d 610 (1993).[7] RCW 36.70C.130, the statute governing "standards for granting relief" under LUPA, provides that:

> The court may grant relief only if the party seeking relief has carried the burden of establishing that. . . .
>
> . . . .
>
> (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
>
> . . . .
>
> (d) The land use decision is a clearly erroneous application of the law to the facts.

RCW 36.70C.130(1)

Gig Harbor Municipal Code (GHMC) § 17.72.030(Q)(4), which governs general parking requirements for "marinas, moorages, and docks," provides: "If commercial or residential development is to be combined with a watercraft usage requiring parking, the usage which generates the larger number of spaces shall satisfy the requirements of the other usage[.]"

The other relevant ordinance is the parking provision specific to the Waterfront Millville zone in which the proposed development is located. GHMC § 17.48.070,

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[7] The parties agree that this is the appropriate standard, but the cases they cite deal with review under the old writ of cert system. *Freeburg v. City of Seattle*, 71 Wn. App. 367, 371, 859 P.2d 610 (1993) and *Hilltop Terrace Homeowner's Ass'n v. Island County*, 126 Wn.2d 22, 29 n.3, 891 P.2d 29 (1995).

provides: "Parking and loading facilities on private property shall be provided in accordance with the requirements of Chapter 17.72 GHMC, *except that where there are properties serving multiple uses, parking shall be provided for the combined total of the individual uses.*" (Emphasis added.)

The Stearnses calculate the parking spaces required as:

Marina with Yacht club	41
Retail/professional complex	15
Duplex	4
House	2
TOTAL	62

Gig Harbor calculates the spaces as:[8]

Marina	41
Yacht Club	30
Retail/professional complex	15
Duplex:	4
House:	2
TOTAL	92

This dispute is whether the parking requirements should be calculated under the general parking ordinance for marinas ("commercial . . . development . . . combined with a watercraft usage requiring parking"), which would allow the parking for the marina to satisfy the

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[8] While these figures are taken from the Appellants' brief, the City and the Appellants agree on the method of determining the number of spaces required for each separate structure or use on the property. They disagree over whether the parking that would be required for the Yacht Club under a "straight" square-footage calculation can be rolled-into the existing Marina parking under the GHMC.

parking for the Yacht Club, or under the Waterfront Millville specific ordinance, which would require separate parking for the Yacht Club.

The Stearnses contend that "the reference in GHMC 17.48.070 to *multiple uses* applies to situations where more than one of the *code defined uses* set forth in GHMC 17.72.030(A) through (T) are served by a single property." The Stearnses then argue that the "marina combined with commercial . . . development [Yacht Club]" is recognized as an "individual use" in 17.72.030(Q)(4), and therefore the proposed development does not comprise "multiple uses" under GHMC 17.48.070.

The City counters that the term "multiple uses" in GHMC 17.48.070 which is not defined elsewhere in the code, has a plain meaning contrary to the Stearnses' interpretation. A yacht club is not the same "use" as a marina. And since the Waterfront Millville-specific ordinance was passed at a later date than the earlier general parking ordinance, GHMC 17.48.070 controls. *See State v. Landrum*, 66 Wn. App. 791, 796, 832 P.2d 1359 (1992) ("[W]hen two statutory provisions dealing with the same subject matter are in conflict, the latest enacted provision prevails when it is more specific than its predecessor.")

We find the City's interpretation persuasive. The Stearnses have cited nothing in the Gig Harbor code to show that the phrase "multiple uses" in GHMC 17.48.070 means only more than one of the "listed uses" from the general parking calculation ordinance, GHMC 17.72.030. Where there is no indication that this definition of "multiple uses" was intended by the city council, the plain meaning of the phrase controls, and a yacht club and

marina are plainly separate, and thus multiple, uses. Accordingly, the City's calculation of the necessary parking spaces is correct.

F. Conditional-Use Permit Subject to Conditions

Finally, the Stearnses contend that the city council erred in reversing the hearing examiner's grant of a conditional-use permit subject to certain conditions.

The definition of a "conditional use" is "a use . . . permitted only after . . . the granting of a conditional use permit *imposing such performance standards* as will make the use compatible with other uses in the same district." GHMC 17.04.260 (emphasis added). The Stearnses contend that "imposing such performance standards" is synonymous with "imposing conditions." Further, the Stearnses cite the chapter of the Gig Harbor Municipal Code dealing with conditional uses, specifically the provision on "Procedure," GHMC 17.64.020(C), which provides: "Granting or Denial. The decision may include special restrictions or conditions deemed necessary or desirable in furthering the intent of the ordinance pertaining to the proposed development." GHMC 17.64.020(C).

While this provision seems to explicitly provide for granting conditional-use permits subject to conditions, what the code gives with one provision it takes away with the next.[9] Or more accurately, two provisions later,

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[9] The Stearnses cite only one case, *State ex rel. Standard Mining & Development Corp. v. City of Auburn*, 82 Wn.2d 321, 510 P.2d 647 (1973). The case is cited for the proposition that

in the section dealing with "Review Criteria," GHMC 17.64.040 provides:

> Each determination granting or denying a conditional use permit shall be supported by written findings of fact showing specifically wherein all the following conditions are met:
>
> . . . .
>
> D. That the site is of sufficient size to accommodate the proposed use and all yards, open spaces, walls and fences, *parking*, loading, landscaping and other features as are required by this title or as needed in the opinion of the examiner.

GHMC 17.64-040(D).

Where general and specific laws address the same subject matter, the specific law applies to the exclusion of the general. *Medical Consultants Northwest, Inc. v. State*, 89 Wn. App. 39, 49, 947 P.2d 784 (1997), *review denied*, 136 Wn.2d 1002 (1998). Therefore, since the GHMC 17.64.040 requires specific findings that a site is of "sufficient size to accommodate . . . all . . . parking," and the hearing examiner found that "[t]he site, while large for the Waterfront Millville District is not of adequate size to accommodate code required parking for all the uses within the

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"conditions can properly be imposed on conditional use permits." While the case does certainly indicate that an administrative body has the inherent power to condition the granting of conditional-use permits, nothing in the case stands for the proposition that such inherent powers cannot be limited through an express legislative act, as appears to have been done by the Gig Harbor City Council in this case. *See* discussion below.

structure proposed," the conditional-use permit could not be issued with a condition relating to parking.

The city council properly reversed the hearing examiner's grant of the conditional use permit.

G. Comprehensive Plan; Height Requirements

The Stearnses maintain that the City failed to provide sufficient factual findings and legal conclusions to allow for meaningful judicial review of the two alternate grounds for denial of the site plan: (1) that the site plan did not meet criteria for "medium usage" so as to be consistent with the comprehensive plan; and (2) that the site plan did not provide public viewing amenities to justify a departure from relevant height limitations in the GHMC. Because we have held that the City properly denied the Stearnses' application because of inadequate parking, we need not address these issues.

In conclusion, we affirm the trial court regarding the substantive LUPA appeal and the constitutionality of RCW 4.84.370, but we reverse the award of attorney's fees based upon a frivolous § 1983 claim.

/s/ Armstrong, J.
Armstrong. J.

We concur:

/s/ Bridgewater, C.J.
Bridgewater, C.J.

/s/ Hunt, J.
Hunt, J.,